DOCKET

No. 86-6060-CSH
Status: GRANTED
CAPITAL CASE

Title: Dale Robert Yates, Petitioner
v.
James Aiken, Warden, et al.

Docketed:
December 19, 1986

Court: Supreme Court of South Carolina

Counsel for petitioner: Bruck,David I.

Counsel for respondent: Zelenka,Donald J.

Entry	Date	Note	Proceedings and Orders
1	Dec 19 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
12	Jan 13 1987		DISTRIBUTED. April 17, 1987. (Motion of petitioner for appointment of counsel).
4	Jan 16 1987		Order extending time to file response to petition until February 17, 1987.
5	Feb 17 1987		Brief of respondents James Aiken, Warden, et al. in opposition filed.
6	Feb 26 1987		DISTRIBUTED. March 20, 1987
7	Mar 23 1987		REDISTRIBUTED. March 27, 1987
8	Mar 27 1987		Relisted by Justice Marshall for April 3, 1987
10	Mar 30 1987		Petition GRANTED.
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11	Apr 6 1987	G	Motion of petitioner for appointment of counsel filed.
13	Apr 20 1987		Motion for appointment of counsel GRANTED and it is ordered that David I. Bruck, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
15	Apr 24 1987		Order extending time to file brief of petitioner on the merits until June 4, 1987.
16	May 11 1987		Joint appendix filed.
17	May 19 1987		Record filed.
18	May 19 1987		Certified copy of original record, 4 volumes, received.
19	Jun 6 1987		Brief of petitioner Dale Robert Yates filed.
20	Jul 17 1987		Brief of respondents James Aiken, Warden, et al. filed.
21	Jul 27 1987		CIRCULATED.
22	Oct 9 1987		SET FOR ARGUMENT. Wednesday, December 2, 1987. (4th case).
23	Nov 13 1987	X	Reply brief of petitioner Dale Robert Yates filed.
24	Dec 2 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-6060

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, WARDEN, CENTRAL CORRECTIONAL INSTITUTION, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

MAY SOUTH CAROLINA AVOID COMPLIANCE WITH THIS COURT'S PREVIOUS ORDER REQUIRING RECONSIDERATION OF PETITIONER'S CASE IN LIGHT OF FRANCIS v. FRANKLIN BY DECLARING THE CONSTITUTIONAL PRINCIPLES OF FRANCIS v. FRANKLIN TO BE NON-RETROACTIVE?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-

DALE ROBERT YATES,

Petitioner,

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JAMES AIKEN, WARDEN, CENTRAL CORRECTIONAL INSTITUTION, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Dale Robert Yates prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina denying Dale Yates's petition for a writ of habeas corpus on remand from the United States Supreme Court is reported as Yates v. Aiken, ___ S.C. ___, 349 S.E.2d 84 (1986), and is reprinted in the Appendix to this petition at A-1 to A-6. The previous decision of this Court granting petitioner's petition for writ of certiorari, vacating the judgment of the South Carolina Supreme Court and remanding for reconsideration in light of Francis v. Franklin, 471 U.S. 307 (1985) is reported as Yates v. Aiken, 474 U.S. ___, 106 S.Ct. 218 (1985). The previous per curiam order of the South Carolina Supreme Court denying Yates's petition for habeas corpus is unreported, and is reproduced infra at A-7. The opinion of the South Carolina Supreme Court affirming Yates's convictions

and death sentence is reported as State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1122 (1983).

JURISDICTION

The judgment of the South Carolina Supreme Court on remand from the United States Supreme Court was entered on September 29, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code Sec. 16-3-10 (1985 Cum. Supp.), which provides:

> "Murder" is the killing of any person with malice aforethought, either express or implied.

STATEMENT OF THE CASE

Last Term, this Court granted Dale Yates's petition for writ of certiorari and remanded his case to the South Carolina Supreme Court with instructions to reconsider petitioner's constitutional challenge to the malice instructions given to the jury at his capital murder trial in light of Francis v. Franklin, 471 U.S. 307 (1985). Yates v. Aiken, 474 U.S. ___, 106 S.Ct. 218 (1985) (per curiam). On remand, the South Carolina Supreme Court acknowledged that "[t]he jury instruction at Yates' trial suffered from the same infirmities . . . addressed in Francis v. Franklin." Yates v. Aiken, ___ S.C. ___, 349 S.E.2d 84, 85 (1986).[1] The South Carolina court nevertheless denied relief. The sole basis for this denial was the state supreme court's conclusion that its decisions declaring burden-shifting jury instructions to be unconstitutional should not be applied to cases such as petitioner's which were already final on direct appeal when these decisions were announced. 349 S.E.2d at 85-86.[2] Justice Finney dissented from the majority's refusal to apply Francis retroactively, arguing that such retroactive application was compelled by this Court's precedents. 349 S.E.2d at 87-89. On October 23, the South Carolina Supreme Court stayed petitioner's execution so as to permit the timely filing and disposition of this petition for certiorari.

The following is a chronology of the events pertinent to this case.

June 16, 1979	Sandstrom v. Montana decided.
April 30, 1981	Petitioner convicted of murder.
December 22, 1982	Petitioner's conviction and death sentence affirmed by South Carolina Supreme Court.
November 1, 1983	South Carolina Supreme Court, in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), sustains Sandstrom challenge to constitutionality of jury instructions similar to those given at petitioner's trial.

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[1]The facts and legal analysis underlying petitioner's Francis v. Franklin claim were set forth in detail in petitioner's previous petition for writ of certiorari in this Court. In the interests of brevity, and because the South Carolina Supreme Court on remand expressly accepted petitioner's assertion that the malice instructions that guided the jury at his trial contained the same defects identified in Francis v. Franklin, Yates v. Aiken, supra, 349 S.E.2d at 85, petitioner will not recapitulate his Francis v. Franklin argument here. Rather, for the convenience of the Court, petitioner has reprinted the prior certiorari petition in its entirety as part of the Appendix. Infra at A-8 to A-23. The malice instructions given at petitioner's trial may be found at pages 3-4 of that petition. Infra at A-13 to A-14.

[2]The South Carolina Supreme Court's holding on remand was prefigured by a brief per curiam order filed in an unrelated case immediately after the state supreme court's receipt of the mandate of this Court requiring reconsideration of petitioner's case. In McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985), filed on November 19, 1985, the South Carolina Supreme Court denied a petition to review a denial of post-conviction relief in a case involving a claim that trial counsel had been ineffective for failing to object to certain instructions which were later held in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), to create an unconstitutional mandatory rebuttable presumption of malice. The South Carolina Supreme Court normally does not issue opinions when it denies such petitions, and the retroactivity of Elmore and its other recent Sandstrom decisions had not been briefed or otherwise raised by the parties in McClary. The South Carolina Supreme Court nevertheless used the occasion of its denial of review of McClary's ineffective-assistance claim to announce, "adopting the reasoning of Shea v. Louisiana, 470 U.S. [51] (1985) . . . that Elmore's retroactive effect is limited to cases pending on direct appeal and will not apply to collateral attacks on criminal convictions."

June 5, 1984	Reversing capital murder conviction due to unconstitutional malice instructions in State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984), South Carolina Supreme Court notes that although trial in Woods preceded Elmore, "we have since applied the Elmore decision retroactively" in two criminal cases.
January 15, 1985	Petitioner files habeas corpus petition in South Carolina Supreme Court challenging constitutionality of malice instructions given at his trial.
April 29, 1985	Francis v. Franklin decided.
May 1, 1985	Petitioner files supplemental memorandum in South Carolina Supreme Court citing Francis v. Franklin as additional authority requiring relief.
May 22, 1985	South Carolina Supreme Court summarily dismisses habeas petition without opinion.
October 15, 1985	United States Supreme Court grants petition for writ of certiorari and remands to South Carolina Supreme Court for reconsideration in light of Francis v. Franklin. Yates v. Aiken, 474 U.S. ___, 106 S.Ct. 218 (1985).
November 14, 1985	Mandate of United States Supreme Court in Yates v. Aiken sent down to Clerk of South Carolina Supreme Court.
November 19, 1985	South Carolina Supreme Court files per curiam order in McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985), "clarify[ing]" retroactivity holding of State v. Woods and holding that Elmore will not be applied retroactively to collateral attacks on criminal convictions.
March 26, 1986	Petitioner's case argued on remand in South Carolina Supreme Court.
September 29, 1986	South Carolina Supreme Court denies relief. Court applies McClary, holds that Elmore is not to be applied retroactively to cases final on appeal when Elmore was decided. Yates v. Aiken, ___ S.C. ___, 349 S.E.2d 84 (1986).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner sought review of the constitutionality of the malice instructions given to the jury at his trial by means of a petition for writ of habeas corpus in the South Carolina Supreme Court.[3] In his petition, he asserted that these instructions

[3]The fact that petitioner did not object to the malice instructions at trial or on direct appeal creates no procedural bar under South Carolina law. The South Carolina Supreme Court has consistently refused to recognize procedural default in capital cases, State v. Drayton, 287 S.C. 226, 337 S.E.2d 216, 217 (1985), State v. Peterson, 287 S.C. 244, 335 S.E.2d 800, 801 (1985), State v. Butler, 277 S.C. 543, 290 S.E.2d 420, 421 (1982), State v. Adams, 277 S.C. 115, 283 S.E.2d 582, 584 (1981), and has

created mandatory rebuttable presumptions of malice in violation of Sandstrom v. Montana, 442 U.S. 510 (1979), and cited two recent South Carolina decisions which applied the principles of Sandstrom, State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) and State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984), to invalidate jury instructions similar to those given at petitioner's trial. While this habeas petition was pending before the South Carolina Supreme Court, this Court decided Francis v. Franklin, 471 U.S. 307 (1985). Petitioner submitted a supplemental memorandum asserting that Francis controlled his case and required vacation of his murder conviction. Three weeks later, the South Carolina Supreme Court summarily denied habeas relief. Infra at A-7. This Court granted certiorari and remanded to the South Carolina Supreme Court for further consideration in light of Francis v. Franklin. Yates v. Aiken, 474 U.S. ___, 106 S.Ct. 218 (1985). On remand, the South Carolina Supreme Court acknowledged the constitutional infirmity of the challenged instructions under Francis v. Franklin, but denied relief on the grounds that the retroactivity of cases prohibiting burden-shifting jury instructions was purely a question of state law, and that United States Supreme Court precedent supported the view that such cases should be applied only to convictions not yet final on direct appeal. Justice Finney dissented, asserting that the retroactivity of Francis v. Franklin was a question of federal law and that Supreme Court precedent required full retroactive application.

reversed capital convictions and death sentences on grounds not raised by the appellants at any stage of the trial or appellate process. State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982), State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890, 894 (1979). In Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984), moreover, the South Carolina Supreme Court granted post-conviction relief on the basis of a claim of improper prosecution jury argument which had been raised for the first time on collateral attack after the death sentence had become final on direct appeal. In view of South Carolina's clear rejection of procedural default in capital cases, petitioner's challenge to the malice instructions at issue here is not procedurally barred as a matter of state law, and the South Carolina Supreme Court has never suggested otherwise.

REASONS FOR GRANTING THE WRIT

The South Carolina Supreme Court's refusal to reconsider this case in light of Francis v. Franklin, 471 U.S. 307 (1985), is based upon three egregious misreadings of the law governing retroactivity of criminal law decisions of this Court. The first of these is the state court's erroneous belief that petitioner's case presents any question of retroactivity at all. The second is its stated view that the question of retroactivity is purely one of state law, and that this Court's retroactivity decisions are not binding but merely "instructive" on the issue of retroactivity. And the third is the state court majority's failure to grasp that decisions regarding unconstitutional burden-shifting jury instructions are among that category of cases which are invariably accorded full retroactive effect because of their effect on the truth-seeking function of criminal trials.

1. Despite the lower court's suggestion that it has merely refused to accord retroactive effect to a "state decision," the decision in question is the case by which South Carolina conformed to the federal constitutional principles of Sandstrom and Francis v. Franklin.

At the outset, petitioner would like to clarify just what it is that South Carolina has refused to apply retroactively in this case. While the South Carolina Supreme Court's opinion on remand is framed in terms of the retroactivity of a "state decision," State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), this should not obscure the fact that State v. Elmore is simply South Carolina's recognition of the federal constitutional principles of Sandstrom v. Montana, 442 U.S. 510 (1979).

Elmore sustained a federal constitutional challenge to malice instructions substantially similar to those given in this case. The appellant in Elmore had asserted that these instructions "created a mandatory presumption of malice which unconstitutionally relieved the prosecution of its burden to prove that element of the offense of murder beyond a reasonable doubt," and cited this Court's decisions in Sandstrom and County Court of Ulster County

v. Allen, 442 U.S. 140 (1979). State v. Elmore, supra, Brief of Appellant at 24. The South Carolina Supreme Court agreed with this contention and reversed without any substantial discussion of the issue beyond its acknowledgement that the instruction on the presumption of malice from the use of a deadly weapon "constituted a mandatory presumption rather than a permissive inference." Id., 308 S.E.2d at 784. Accord, State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984). Any possible doubt that Elmore represents anything other than the application of United States Supreme Court case law was removed, moreover, by the South Carolina Supreme Court's statement in its opinion on remand in this case that "[t]he jury instruction at Yates' trial suffered from the same infirmity present in Elmore and addressed in Franklin." Yates v. Aiken, ___ S.C. ___, 349 S.E.2d 84, 85 (1986). Accordingly, the Elmore case to which South Carolina has refused to accord retroactive effect in this case is a "state decision" only in the most formal sense. The principle of law which South Carolina has refused to apply to petitioner is nothing other than the federal constitutional rule of Sandstrom v. Montana and Francis v. Franklin against burden-shifting presumptions, and it is on that basis that the South Carolina Supreme Court's non-retroactivity holding must be viewed.

2. Despite the ruling below, Francis v. Franklin presents no genuine question concerning retroactive application.

As the foregoing discussion suggests, this case actually presents no issue of retroactivity at all. The constitutional basis of petitioner's challenge to the instructions given at his 1981 murder trial is this Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1979), a case decided two years before petitioner's trial. The fact that four years elapsed between Sandstrom and the South Carolina Supreme Court's recognition in State v. Elmore of the invalidity, under Sandstrom, of the malice instructions given here does not entitle South Carolina to postpone Sandstrom's effective date to that of Elmore. The simple fact is that the instructions given at petitioner's trial were constitutionally

invalid under Sandstrom at the moment they were read to the jury, and the South Carolina Supreme Court majority's suggestion to the contrary is manifestly without merit.

3. To the extent that the decision below is based upon the South Carolina Supreme Court's belief that the retroactivity of this Court's constitutional decisions is a question of state law, the state court was plainly mistaken.

As noted previously, the South Carolina Supreme Court began its opinion on remand by acknowledging that "[t]he jury instruction at Yates' trial suffered from the same infirmity present in Elmore and addressed in [Francis v.] Franklin." Despite this recognition of the federal constitutional character of the legal error involved in both Elmore and in this case, the remainder of the majority opinion appears to treat the error as merely one of state law. After expressing its view that this Court's decisions regarding retroactive application of new rules of criminal law are "a mass of confusion," the majority announced that its task in this case was to apply those decisions "at the state level to determine the retroactive effect of a prior state decision." 349 S.E.2d at 85. It then asserted that the one "controlling" factor in this Court's body of retroactivity decisions is that "'[r]etroactive application is not compelled, constitutionally or otherwise.'" Id., quoting Solem v. Stumes, 465 U.S. 638, 642 (1984). The state supreme court majority concluded from this that it was free to determine its own standard regarding retroactivity of state decisions, and that United States Supreme Court decisions concerning retroactivity were not binding upon it. Id.

If this preamble was meant to suggest that application of Sandstrom's prohibition of burden-shifting jury instructions was purely a matter of state law, then the South Carolina court's error is self-evident. But since the majority opinion had begun by acknowledging that the jury instructions in Elmore, Francis v. Franklin and this case all involve "the same infirmities," the court could not have supposed that the underlying constitutional claim in this case was controlled by state law alone. Rather,

the majority opinion appears to have misread the Court's general remarks in Solem v. Stumes as indicating that the states are free to ignore the entire body of this Court's decisions concerning retroactive application of federal constitutional cases.

This view is, again, self-evidently wrong. While the Court has repeatedly recognized that retroactive application of constitutional decisions in the criminal law is not in and of itself required by due process, Linkletter v. Walker, 381 U.S. 618, 628-629 (1965), Solem v. Stumes, supra, this has meant only that the retroactive application of such decisions must be determined on a case-by-case basis, with due regard for the nature of the right implicated by each decision. United States v. Johnson, 457 U.S. 537 (1982). Once this Court has determined whether and to what extent a rule of constitutional law is to be applied retroactively, that determination is binding on the states.

4. Even if Francis v. Franklin had announced new constitutional doctrine, full retroactive application would be required because Francis is primarily designed to safeguard the truth-seeking function of criminal trials.

As noted earlier, this case presents no genuine question of retroactivity, since State v. Elmore and Francis v. Franklin both did no more than to apply Sandstrom v. Montana to instructions involving rebuttable rather than conclusive presumptions. But even if Francis v. Franklin had created new constitutional doctrine, this Court's retroactivity decisions leave no doubt that full retroactive application would be required.

As the Court noted in United States v. Johnson, 457 U.S. 537 (1982), the retroactive effect of various constitutional decisions in criminal procedure varies widely. At one extreme, some new decisions in areas unrelated to the accuracy of the factfinding process at trial have been applied "only to future cases, denying the benefit of the new rule even to the parties before the Court." 457 U.S. at 544. At the center of the retroactivity spectrum are cases such as Edwards v. Arizona, 451 U.S. 477 (1981), which announced a new constitutional rule only marginally related to

the factual reliability of past trials. Edwards has been held fully applicable to cases which were pending on direct appeal when Edwards was decided, Shea v. Louisiana, 470 U.S. 51 (1985), but inapplicable on collateral review of convictions which had already been affirmed prior to Edwards. Solem v. Stumes, 465 U.S. 638 (1984). At the other end of the spectrum, "the Court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" United States v. Johnson, supra, 457 U.S. at 544, quoting Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion); and see Solem v. Stumes, supra, 465 U.S. at 643-644. As the Court explained in Williams v. United States, supra, new constitutional doctrine designed to overcome defects in the truth-seeking process in criminal trials is invariably given "complete retroactive effect," and "[n]either good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." 401 U.S. at 653.

There can be no doubt that Francis v. Franklin's prohibition against burden-shifting presumptions is among the rules which must, under United States v. Johnson, be given full retroactive effect. The principle of Francis v. Franklin which "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime . . . protects the 'fundamental value determination of our society. . . that it is far worse to convict an innocent man than to let a guilty man go free.'" 471 U.S. at 313, In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). The Court has already expressly declared that In re Winship and Mullaney v. Wilbur, 421 U.S. 684 (1975), the first two decisions expounding this "bedrock, 'axiomatic and elementary'" constitutional principle, 471 U.S. at

313, are to be give full retroactive effect. Ivan V. v. City of New York, 407 U.S. 203 (1972) (applying Winship retroactively), Hankerson v. North Carolina, 432 U.S. 233 (1977) (applying Mullaney retroactively). Since Sandstrom v. Montana, 442 U.S. 510 (1979) and Francis v. Franklin simply apply Winship and Mullaney to the question of burden-shifting jury instructions, it is plain that these cases, like Winship and Mullaney, belong to that class of constitutional decisions which lie at the "extreme" of full retroactivity to which the Court referred in United States v. Johnson.

In short, because Francis v. Franklin's rule against burden-shifting jury instructions implicates the most basic aspect of the truth-seeking process in our system of criminal justice, a criminal conviction obtained in violation of that rule cannot stand merely because it became final before Francis v. Franklin was decided. For this additional reason, South Carolina's refusal to afford petitioner the benefit of the constitutional principles enunciated in Francis v. Franklin is clearly erroneous, and warrants correction by this Court.

5. The persistence of the South Carolina Supreme Court's misapplication of this Court's retroactivity precedents warrants the granting of review.

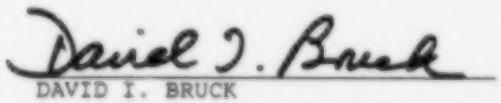
This case marks the second time in three months that a majority of the South Carolina Supreme Court has in a written opinion flagrantly misapplied this Court's retroactivity decisions in order to avert a reversal in a capital case. In Truesdale v. Aiken, 289 S.C. 488, 347 S.E.2d 101 (1986), petition for cert. filed, Sept. 18, 1986 (No. 86-5530), the South Carolina court declared that prisoners sentenced to death in violation of this Court's decision in Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986) should be denied the benefit of that decision so long as their death sentences had become final on direct appeal before Skipper was decided. Since Truesdale, the same court has refused in two other post-conviction cases to review plainly meritorious Skipper claims, apparently on the basis of

its view that Skipper need not be applied retroactively. Patterson v. Aiken and Koon v. Aiken, petitions for cert. filed, December 17, 1986.[4] In short, the South Carolina Supreme Court's misreading of the law governing retroactivity of constitutional decisions is now firmly entrenched, and may be expected to continue unless corrected by this Court.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

December 17, 1986

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[4]The facts of both of these cases are summarized in Patterson v. South Carolina, 471 U.S. 1036 (1985) (Marshall, J., dissenting from denial of certiorari). In Patterson, the South Carolina Supreme Court denied post-conviction review despite the state's concession that the defendant's Skipper claim would probably warrant relief if the case were on direct appeal.

OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

No. 86-6060

October Term 1986

Dale Robert Yates,

Petitioner,

vs

James Aiken, Warden, Central Correctional Institution, and the Attorney General of South Carolina,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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PETITIONER'S QUESTION PRESENTED

MAY SOUTH CAROLINA AVOID COMPLIANCE WITH THIS COURT'S PREVIOUS ORDER REQUIRING RECONSIDERATION OF PETITIONER'S CASE IN LIGHT OF FRANCIS v. FRANKLIN BY DECLARING THE CONSTITUTIONAL PRINCIPLES OF FRANCIS v. FRANKLIN TO BE NON-RETROACTIVE?

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IN THE
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No. 86-6060

October Term 1986

Dale Robert Yates,

Petitioner,

vs

James Aiken, Warden, Central Correctional Institution, and the Attorney General of South Carolina,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Respondents, above named, make Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina denying the Petition for a Writ of Habeas Corpus.

OPINION BELOW

The opinion of the Supreme Court denying the Petitioner's petition for a writ of habeas corpus on remand is reported at Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). The previous order of this Court granting the earlier petition for writ of certiorari vacating the judgment of the South Carolina Supreme Court and remanding the matter for reconsideration is reported as Yates v. Aiken, 474 U.S.__, 106 S.Ct. 218 (1985). The previous per curiam order of the Supreme Court of South Carolina denying the petition for habeas corpus is unreported and produced at A-7. The opinion of the South Carolina Supreme Court affirming Yate's conviction and sentence is reported at State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1124 (1983).

JURISDICTION

The judgment of the South Carolina Supreme Court on remand from the United States Supreme Court was entered on September 29, 1986. Petitioner asserts that the jurisdiction of this Court is made pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life ... without due process of law ... .

2. This case also involves S.C. CODE § 16-3-10 (1986 Cum. Supp.), which provides:

> Murder is the killing of any person with malice aforethought, either express or implied.

RESPONDENTS' STATEMENT OF THE CASE

This Petition for Certiorari involves a Petition for a Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court challenging a jury instruction on malice that was not objected to or ruled on in the trial court nor raised in the direct appeal or pursuant to the state's uniform post conviction relief statute, S.C. CODE § 17-27-10 et seq. (1976). The Petitioner made a Petition for Habeas Corpus in the original jurisdiction of the Supreme Court, which consolidated the Petition with a pending appeal on a post conviction relief application that was presented to it in which there was no challenge to the malice instruction. After the State had made its Return to the Petition, the Supreme Court of South Carolina stated "we have also considered the petition for writ of habeas corpus and conclude it should be denied" on May 22, 1985.

The Petitioner made a petition for certiorari in the United States Supreme Court concerning the State Supreme Court's denial of the writ of habeas corpus in its original jurisdiction. The Respondents made a brief in opposition asserting that it was unclear whether the federal question raised therein was decided in the State Supreme Court on its merits or whether the issue was rejected on the basis of non-retroactivity or a procedural default. On October 15, 1985, the United States Supreme Court granted the petition for certiorari, vacated the judgment, and remanded the case to the Supreme Court of South Carolina for further consideration in light of Francis v. Franklin, 471 U.S. 307 (1985).

After re-briefing and oral argument, on September 29, 1986, the Supreme Court of South Carolina issued its opinion denying the petition for a writ of habeas corpus. Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). In their decision, the Court held that they would adhere to their decision in McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985), that the retroactive application of State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), is limited to cases pending on direct appeal at the time Elmore was decided. 349 S.E.2d at 87. On October 23, 1986, the South Carolina Supreme Court stayed the Petitioner's sentence of death pending the filing and disposition of this petition before this Court.

During the Petitioner's 1981 murder trial, the overwhelming evidence reveals that the Petitioner entered into and fully participated in a criminal plan that led to the death of a victim of his criminal design and the death of one of the confederates. On February 12, 1981, David Loftis, Henry Davis and the Petitioner, Dale Yates, talked

about various places to rob. (Tr. p. 813, ll. 21-24, p. 815, ll. 5-12). Petitioner mentioned that his brother had a gun, suggested that his brother would be more likely to lend the gun to Loftis than himself, and rode with Loftis and Davis to borrow the pistol. (Tr. p. 816, l. 23 - p. 819, l. 10). Loftis, Davis and the Petitioner spent the night of February 12 in the same apartment and the following morning, February 13, 1981, rode around in the same car casing places (stores) for an armed robbery. During this time, Loftis told Davis and the Petitioner that the electric chair was a possibility if someone were killed during the armed robbery. (Tr. p. 820, l. 20 - p. 825, l. 14). At approximately 3:00 P.M., the Petitioner and Davis left Loftis at a mall and drove away with the pistol under the passenger side of the front seat. (Tr. pp. 828-829, l. 6).

The Petitioner and Davis subsequently entered Wood's store, by his own testimony, for the purpose of committing an armed robbery (Tr. p. 1084, l. 23 - p. 1085, l. 6; p. 1086, l. 24 - p. 1087, l. 14; p. 1092, ll. 16-25). The Petitioner approached Willie Wood and at gunpoint demanded money; Davis made the same demand with the threat of a knife wielded in a stabbing motion. Wood gave Davis approximately $3,000, and Davis handed the money to Yates. (Tr. p. 1095, ll. 13-22). Davis directed Wood to bend over the store counter but Wood refused to do so after looking at Davis' stabbing motions with the knife. (Tr. pp. 914-915, l. 19; p. 922, l. 17 - p. 923, l. 3; p. 930, ll. 16-25). By his own testimony, Yates, at Davis' direction, shot at Wood two (2) times, as he stood approximately two (2) steps or six (6) to ten (10) feet from the door of the store, and left the store after determining both that Wood was unarmed and a previously unseen female was present. (Tr. p.

1097-1098, l. 6; p. 1093, ll. 1-7). Yates testified that he heard a female voice say "what's going on out there?," and then he said "let's go" and turned and went out the door. (Tr. pp. 1098, 1103). He further testified that he entered the passenger side of the getaway car with both the gun and money, waited for Davis, and moved over to the steering wheel and drove away only when he thought that Davis had been caught. (Tr. p. 1098, l. 7 - p. 1099, l. 3).

Meanwhile, after being shot by Yates, Wood saw Davis coming around the counter toward him with the knife. Wood attempted to go to the front of the counter, but Davis reached Wood's back and his (Wood's) mother (approximately sixty-eight (68) years old) attempted to help him by grabbing Davis. (Tr. p. 916, l. 17 - p. 917, l. 2; p. 922, l. 17 - p. 923, l. 3). When his mother fell to her hands and knees, Wood had been able to get his pistol from underneath his coat (Tr. p. 916, ll. 3-12) and shot, backing Davis away from him, until Davis dropped the knife and fell to the floor dead. (Tr. p. 927 - p. 928, l. 6; p. 918, l. 21). Wood watched his mother die on the floor from a knife wound which had penetrated her heart and the full thickness of her chest. (Tr. p. 917, l. 19 - p. 918, l. 21; p. 954, l. 16 - p. 955, l. 23).

During the trial, the trial court, without objection, instructed the jury on murder and the element of malice, in its pertinent part as follows:

> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought, and such proof must be beyond a reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The

> words 'express' and 'implied' do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.
>
> Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.
>
> Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.
>
> There must be malice aforethought. While the law does not require that malice exists for any particular length of time before the commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be the combination of the previous evil intent and the act which produces the fatal result.

(Tr. pp. 1207-1208). (Emphasis added).

The trial court also gave the jury instructions which concerned vicarious liability from an unlawful purpose (Tr. pp. 1209-1210), that a defendant is not responsible for a homicide committed by a co-defendant as an independent act growing out of private malice or ill-will which the slayer had toward the deceased (Tr. p. 1210), and withdrawal and abandonment. (Tr. p. 1211).

After the conclusion of the charges, trial counsel and the court had the following dialogue concerning the instruction on withdrawal:

> THE COURT: Mr. Mauldin, well, I, at no time ever intimated that you had the burden of proof. I don't think I did.
>
> MR. MAULDIN: That is correct. I don't recall any inference or statement that we did have the burden, it was simply a recitation of the fact that we might present that (withdrawal) as a defense ... .

(Tr. p. 1217). The jury convicted the Petitioner of murder, armed robbery and assault and battery with intent to kill. He was sentenced to death on the murder charge. This matter was affirmed by the Supreme Court of South Carolina on appeal and certiorari was denied by this Court. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1124 (1983). The issue presently before this Court was not raised on the appeal or in the post conviction relief proceedings.

WHETHER THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In the decision presently being challenged, the South Carolina Supreme Court held that its own decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), would be applied retroactively to cases pending on direct appeal at the time it was decided, but not to cases subsequently presented under collateral attack such as the instant case. Yates, supra, 349 S.E.2d at 86. The Petitioner places overly great importance to this line in the introductory portion of the Court's opinion: "The jury instruction at Yates' trial suffered from the same infirmities present in Elmore and addressed in Francis v. Franklin, supra." Respondents submit that the issue of the retroactivity of the Elmore decision is properly before this Court, but that

the constitutional infirmity of the particular charge in this case has not yet been reached by the South Carolina Supreme Court.

WHY THE WRIT SHOULD NOT BE GRANTED

1. The Supreme Court of South Carolina did not err in declining to hold retroactive in collateral review its own decision in State v. Elmore, 279 S.C. 18, 316 S.E.2d 781 (1983), in a case where no objection to the jury charge on malice was raised at trial nor in the original appeal before that Court.

In its decision below, the South Carolina Supreme Court resolved that its own decision in State v. Elmore, 279 S.C. 18, 316 S.E.2d 781 (1983), should not be applied retroactively to this case. The Court relied upon the reasoning of Justice Harlan on the issue of retroactivity involving collateral attacks on convictions. See: Desist v. U.S., 394 U.S. 244 (1969) (Harlan, J., dissenting); Mackey v. U.S., 401 U.S. 667 (1971) (Harlan, J., concurring). Accord: Hankerson v. North Carolina, 432 U.S. 233 (1977) (Powell, J., concurring); Griffith v. Kentucky, __U.S.__, 107 S.Ct. 708, 716 (1987) (Powell, J., concurring). The Court determined that retroactive application of its decision in Elmore was limited to cases pending on direct appeal at the time Elmore was decided. It further held that collateral attack of a criminal conviction on the basis of a legal precedent that developed after the conviction became final must be reserved for those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction. 349 S.E.2d at 86.

The Petitioner argues that the state court's refusal to apply its decision in Elmore retroactively to this case in fact evidences a refusal to apply Francis to this case and that it is a subterfuge to postpone Sandstrom v. Montana's effective date to that of Elmore. (Petition,

pp. 6-8). He further contends that Francis's prohibition against burden shifting presumptions should be given full retroactive application.

In Linkletter v. Walker, 381 U.S. 618, 629 (1965), this Court explained that "the Constitution neither prohibits nor requires retrospective effect" of a new constitutional rule. Most recently, the Court addressed the issue of retroactivity and held that a new rule for the conduct of criminal cases, such as the ruling in Batson v. Kentucky, 476 U.S.__, 106 S.Ct. 1712 (1986), applies retroactively to all cases, state or federal, pending on direct review or not yet final. Griffith v. Kentucky, __U.S.__, 107 S.Ct. 708 (1987). In Allen v. Hardy, 476 U.S.__, 106 S.Ct. 2878 (1986), the Court held that the same Batson mandate would not be applied retroactively on collateral review of decisions that became final before the Batson opinion was announced. In the Griffith decision, Justice Powell concurred, continuing to support his view under Justice Harlan's logic in Mackey, supra, that "habeas petitions generally should be judged according to the constitutional standards existing at the time of conviction." Griffith v. Kentucky, 107 S.Ct. at 716-717 (Powell, J., concurring).

In deciding the extent to which a decision announcing a new constitutional rule of criminal procedure should be given retroactive effect, the Court has traditionally weighed three factors. They are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Solem v. Stumes, 465 U.S. 638, 643 (1984). In Allen v.

Hardy, supra, the Court recognized that retroactive effect is appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials, but the fact that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity. "Instead, the purpose to be served by the new standard weighs in favor of retroactivity where the standard goes to the heart of the truthfinding function." Allen, 106 S.Ct. 2880. In Hankerson v. North Carolina, 432 U.S. 240, 243 (1977), the Court stated, in applying the mandates of Mullaney v. Wilbur, 421 U.S. 684 (1975), to a case pending on direct (not collateral) review: "where the major purpose of a new constitutional doctrine is to overcome an aspect of a criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect." The Court noted in Hankerson, 432 U.S. 244, n. 8, that "the States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that a failure to object to a jury instruction is a waiver of any claim of error."

Respondents respectfully submit the rebuttable inferences set forth in the challenge presented to this Court do not "substantially impair its truth finding function and so raise serious questions about the accuracy of the guilty verdict." In Francis v. Franklin, supra, this Court addressed the use of rebuttable presumptions for the first time and how the use of those presumptions affected the prosecution's burden of proof on the issue of intent for malice murder in Georgia. See: Francis v. Franklin, supra, (Powell, J., dissenting) (Rehnquist, J., dissenting).

The instructions at issue in Francis, which provide that the challenged presumptions "may be rebutted," were very different from the conclusive language at issue in Sandstrom. Respondents have not found any case that resolves whether Francis is to be applied retroactively. Compare: U.S. v. Lewis, 797 F.2d 358, 365, n. 5 (7th Cir. 1986). Since the decision in Francis does not reflect that the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction, full retroactivity to collateral review is not necessary. U.S. v. Johnson, 457 U.S. 537 (1982). The Petitioner's assertions are without merit.

2. The writ should not be granted because the jury charge in this case passes constitutional muster under this Court's mandates in Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985).

Respondents respectfully submit that the State Courts have not reviewed the merits of entire jury charge in this case. The Petitioner relies upon an introductory phrase in the third paragraph of the State Court opinion that "the jury instruction at Yates' trial suffered from the same infirmities present in Elmore and addressed in Francis v. Franklin, supra." Yates, supra, 349 S.E.2d at 85, to support his claim that the State Court has already resolved the merits of the charge against the Respondents. While the claims are similar to those present in Elmore, we submit that appropriate analysis under Francis v. Franklin, supra, reveals no constitutional infirmity in a case where no objection to the charge was raised at trial or in direct appeal and the burden of persuasion was never shifted to the defendant.

In South Carolina, state habeas corpus proceedings cannot be a substitute for an appeal. Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). In this case, trial counsel

Mauldin stated on the record after the jury instructions were given that the trial court had not intimated that the defendant had the burden of proof (by inference or statement). (Tr. p. 1217, ll. 10-19). No challenge has been made to counsel's competence or his failure to object to the charge in the state post conviction proceedings or on direct appeal and none is made here by the Petitioner. Compare: State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981). We respectfully submit, therefore, that he has failed to meet his threshold burden of establishing a ground for relief under state procedural law. Simply put, this forum is not a substitute for an appeal.

Assuming arguendo that the merits of his challenge to these proceedings can be reviewed, we respectfully submit that such a review reveals that he is not entitled to a new trial on murder. Yates challenges the instruction on malice concerning alleged "mandatory rebuttable presumptions." He contends that the part of the unobjected charge concerning the "doing of an unlawful act" and "use of a deadly weapon" created such a presumption. In its pertinent part, the charge reads as follows:

> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought, and such proof must be beyond a reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words 'express' and 'implied' do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.
>
> Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances

which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before the commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be the combination of the previous evil intent and the act which produces the fatal result.

(Tr. pp. 1207-1208). (Emphasis added).

As stated in Francis v. Franklin, 105 S.Ct. 1965 at 1968 (1985), "[t]he question is whether these instructions, when read in the context of the jury charge as a whole, violate the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt." The following analytical approach is used in cases raising this issue. First, the Court must determine whether based upon the specific language of the instruction creates a constitutionally objectionable "mandatory presumption," or "merely a permissive inference," on an essential element of the crime. Francis, 105 S.Ct.

at 1971. Second, "if a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption ..., then the potential offending words must be considered in the context of the charge as a whole." Francis, 105 S.Ct. at 1971.

Under the plurality's analysis in Francis, the initial step in ascertaining the constitutionality of an instruction is to determine the nature of the presumption it describes. Id. 105 S.Ct. at 1971. The Court must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference. A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A mandatory presumption may be either conclusive or rebuttable. Mandatory presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense.

On the other hand, a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. Id. at 1971. A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based upon the predicate facts proven. Such inference does not necessarily implicate the concerns of Sandstrom v. Montana, 442 U.S. 510 (1979). A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of proven facts before the jury. County Court of Ulster County v. Allen, 442 U.S. 140, 157-163 (1979). For example, a permissive inference would allow, but not require, the

fact-finder to infer an "elemental fact," such as intent or malice, from proof of a "basic fact," such as a knowing act. Permissive inferences leave the trier of fact free to credit or reject the connection between basic and elemental facts: they place no burden of any kind on the defendant and affect the State's burden only if there is no rational connection at all. Ulster County Court, 442 U.S. at 157.

To determine the nature of the "presumption," it is necessary to focus on the specific words spoken to the jury, for the constitutional standard depends on how a reasonable juror could have interpreted the instruction. Sandstrom, 442 U.S. at 514. If a specific portion of the jury charge, considered in isolation, could have been understood as creating a presumption that relieves the State of its burden of persuasion, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm charge to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. Francis, supra, at 1971, citing Cupp v. Naughton, 414 U.S. 141 (1973).

The jury charge in this case contains two separate issues raised in this habeas proceeding to determine the nature of the presumptions. The first passage, containing four sentences, reads:

> Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence.

(Tr. p. 1207, l. 20 - p. 1208, l. 8).

We submit this passage of the charge created a mere permissive presumption. The first sentence made it clear that malice "may" be implied or "inferred" from the facts and circumstances proved by the state. The second sentence clarified and restated the first sentence, "it defined implied malice." Collins v. Francis, 728 F.2d 1322, 1330 (1984); Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S 1824 (1983). This sentence reflects "substantially the famous definition of malice by Bayley, J., in Bromage v. Proser, 10 E.C.L. 321: "'Malice, in common acceptation, means ill will against a person but in its legal sense it means a wrongful act done intentionally without just cause or excuse.'" State v. McDaniel, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904). The petitioner would have a much stronger position if the second sentence read, "and malice must be implied, it must be presumed," or "malice shall be presumed, it shall be implied." Given the language used, "malice is implied, it's presumed ...," and its context in the charge, the jury was left free to credit or reject the inference suggested by the court.

The third sentence made it clear that the jury was under no mandate to find that malice existed. The trial judge restated what he had said seconds before and qualified the statement with the words "in its general signification." There was not a hint of a suggestion that the jury's fact finding duty was being curtailed or that it had to find that Yates had acted with malice. In the fourth sentence, the jury was not told that the defendant was required to rebut malice if it found it to exist. Instead, the charge only

pointed out that it was possible to rebut the presumption. Immediately after the word "rebuttable," the judge drew the jury's attention back to its unique province to find malice from "the rest of the evidence" and then properly allocated the burden of proof on this issue to the state by stating that rebuttable meant "it is not conclusive on you." (Tr. p. 1208, l. 8).

Assuming arguendo, that this part of the instruction created a mandatory (rebuttable) presumption because of the terms "presume," "presumption," and "rebuttable," the Francis analysis leads to the single conclusion that a reasonable juror could not have understood the charge to have created an unconstitutional presumption. Francis, supra. Although the charge contains the word "presume," the jury was not told that malice "shall" or "must" be presumed if the State proves the predicate facts. Unlike in Francis, the instruction in this case repeatedly announces its own permissiveness--the jury was free to credit or reject the inference suggested by the Court. In addition, the words at issue were accompanied by a strong explanation of circumstantial evidence which would tend to indicate the ways the state could prove implied malice. Because of these factors, even if the words created some type of rebuttable presumption, its impact upon the reasonable juror was likely no greater than a reasonable inference.

The Petitioner asserts this instruction relieved the State of establishing his own malicious intent in the murder of Mrs. Wood once it had been shown that he committed some unlawful act without just cause or excuse. The Petitioner wholly ignores in his belated attempt to challenge these instructions that the jury was specifically

charged "a defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose." (Tr. p. 1210). Under these instructions, a reasonable juror could not have considered the allegedly infirm charges to have created an unconstitutional presumption. Francis, supra, at 1971.

It was clear that with charge on the law of the parties that the State's burden, under Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, supra, would be to prove both that the actual killer, presumably Davis, had malice, and that Yates intended to be an accomplice in the crimes. Because of the forceful and repeated blows dealt by the perpetrator, the overwhelming evidence can allow the assumption that the actual killer had the specific intent to kill. Since the jury charge required the State to prove that Yates had agreed upon the "unlawful common purpose that involves the probable contingency of taking of a human life" (Tr. p. 1209, ll. 16-22), and there was overwhelming evidence of this agreement through the defendant's own testimony, it must be concluded that any instruction on this matter, even if burden shifting was harmless. See: State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). Compare: Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), and State v. Peterson, __ S.C. __, 335 S.E.2d 800 (1985).

In the second portion of the charge that is disputed reads as follows:

> ... malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to,

> the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

(Tr. p. 1208). The Petitioner asserts these instructions were infirm becsuse a jury could have concluded that unless all the circumstances were reliably established, the jury was required to heed the presumption rather than the evidence, or lack of evidence, of malice. We respectfully submit that this charge created no presumption, not even a permissive one. The first sentence of the charge is derived from common law (see: State v. Levelle, 34 S.C. 120, 127, 13 S.E. 319, 320 (1891), and the statement is usually qualified by the instruction that the presumption "vanishes" or "is removed." See: State v. Hopkins, 15 S.C. 153, 157 (1880). The language is not mandatory, it is simply a definition of malice. This instruction tells the jury that a finding of malice may be based entirely on circumstantial evidence, the use of a deadly weapon, but that the state must still prove malice by evidence which satisfies the jury beyond a reasonable doubt. There is no reference to the defendant or any duty on his part to produce "some" evidence. It can be concluded that a reasonable juror could only have understood that once the circumstances of the victim's death were in evidence, the state was not entitled to a presumption or inference of any kind. That was the factual situation presented in this case.

The United States Court of Appeals for the Fourth Circuit has recently upheld challenges to a similar charge recently. Rook v. Rice, 783 F.2d 401 (4th Cir. 1986); Davis v. Allsbrooks, 778 F.2d 168, 173 (4th Cir. 1985). In

each of these cases, the Fourth Circuit held that a state may legitimately shift a burden of production (not persuasion) on an element of a crime to the defendant. We submit that the effect of these charges does no more than that. These instructions, if anything, only shifted the burden of production on the defendant. Sandstrom v. Montana, 442 U.S. 510, 514-519 (1979). This Court should have no difficulty, as the Fourth Circuit did not, in concluding that the "presumption" relied on satisfying the requirements of County Court v. Allen, 442 U.S. 140 (1979), that the fact allegedly presumed (malice) be rationally connected to the proven fact (use of a deadly weapon). Being satisfied of that nexus, we submit that this Court must reject his challenges to the jury instructions and find no constitutional infirmity that denied the Petitioner a fundamentally fair trial. As previously stated, the charge read as a whole completely placed the burden of persuasion on the State to show murder beyond a reasonable doubt. The jury's conviction, based upon appropriate instruction, resolved that issue.

3. Upon review of the entire record before this Court, the error, if any, on the malice charge is harmless error beyond a reasonable doubt in light of the overwhelming evidence of guilt of murder beyond a reasonable doubt.

In Rose v. Clark, 478 U.S.__, 106 S.Ct. 3101 (1986), the United States Supreme Court held that the harmless error analysis of Chapman v. California, 386 U.S. 18 (1967), applies to jury instructions found to be impermissible under Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985). In Rose, this Court approved of a test under which the reviewing court should not set aside an otherwise valid conviction if the court may confidently say, on the whole

record, that the constitutional error in question was harmless beyond a reasonable doubt. In Rose, the Court held that "the fact that the respondent denied that he had an intent to do any injury to another does not dispose of the harmless error question." 106 S.Ct. 3101. It has been suggested that the inquiry is "whether the evidence was so dispositive of intent (malice) that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Rose, 106 S.Ct. at 3109, (quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1985) (Powell, J., dissenting).

As stated above, the inquiry is not whether intent was a disputed issue at trial. In its decision below, the Court held that Yates was found guilty of the murder of Mrs. Wood under the theory of the "hand of one, hand of all" based upon the theory of law when two or more persons aid, abet, and encourage each other in the commission of a crime, all being present, each is guilty as a principal. Therefore, the State had to prove that the actual killer, Henry Davis, had malice, and that Yates intended to be an aider in the commission of the crime. Here, Yates and Davis spent two days casing places for an armed robbery, even discussing the possibility of the electric chair if someone was killed during the robbery. (Tr. pp. 820-825). After selecting the store, Yates, armed with a gun, approached Willie Wood and demanded money, while Davis was making a stabbing motion with a knife toward Wood. (Tr. pp. 1084-1087). Wood gave Davis the money and was directed by him to bend over. (Tr. pp. 914-915). As Yates testified at trial, he shot at Wood after being directed to do so by Davis. (Tr. p. 1093, 1097-1098). After hearing a female voice, Yates said "let's go" and then went out the door and

waited in the car for Davis. (Tr. p. 1098). Meanwhile, Davis approached Wood with the knife and his 68-year old mother attempted to help him. His mother was stabbed with a knife by Davis that forcefully penetrated her heart and the full thickness of her chest. (Tr. pp. 917-918, pp. 954-955).

Here, it is clear that the jury found that the relevant predicate facts existed beyond a reasonable doubt and from those facts that malice could be inferred so that no rational juror could find that defendant Yates committed his acts without intending to cause injury with malice. This evidence is overwhelming and permits this one rational conclusion. We submit that a reasonable juror could not have found otherwise in the proof presented by the State, the instructions on the presumption of malice notwithstanding. Simply stated, it would defy common sense to conclude that this violent robbery-murder was committed unintentionally, and it follows that no rational jury would need to rely on the challenged portion of the charge on the issue of malice. See: McKenzie v. Risley, 801 F.2d 1519, 1526 (9th Cir. 1986); Beck v. Morris, 801 F.2d 242 (6th Cir. 1986). Myrick v. Maschner, 799 F.2d 642 (10th Cir. 1986) (while petitioner asserted that he did not intend to assist the triggerman, harmless error was found where his intent to aid in the commission of the substance crimes went beyond mere presence at the scene); Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986); Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986).

CONCLUSION

For all the foregoing reasons, we submit that the petition for a writ of certiorari is without merit.

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By: [signature]

February 17, 1987
Columbia, South Carolina

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE
ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

A P P E N D I X

Dale Robert YATES, Petitioner,

v.

James AIKEN, Warden, CCI, and the Attorney General, South Carolina, Respondents.

No. 22614.

Supreme Court of South Carolina.

Heard March 26, 1986.

Decided Sept. 29, 1986.

Defendant was convicted in the General Sessions Court, Greenville County, C. Anthony Harris, J., of murder, armed robbery, assault and battery with intent to kill, and conspiracy, and, upon recommendation of jury, was sentenced to death. Defendant appealed. The Supreme Court, 280 S.C. 29, 310 S.E.2d 805, affirmed. After defendant's petition for writ of habeas corpus was denied by summary order, the United States Supreme Court, 106 S.Ct. 218, vacated denial of the petition and remanded for reconsideration. On remand, the Supreme Court, Ness, C.J., held that: (1) retroactive application of rule of *State v. Elmore*, regarding presumption of malice from use of deadly weapon, would be limited to cases pending on direct appeal at time *Elmore* was decided, and (2) death sentence could be imposed upon defendant who participated in robbery during which accomplice killed victim.

Petition denied.

Finney, J., filed dissenting opinion.

1. Courts ⇐100(1)

Prospective application should be afforded a new rule of criminal procedure established by judicial ruling which is a "clear break" from earlier precedent.

2. Courts ⇐100(1)

Full retroactivity, even by collateral attack, should be permitted when ruling establishes that trial court's action is void ab initio or that defendant's conduct was not subject to criminal punishment.

3. Courts ⇐100(1)

New rule of criminal law which is not a "clear break" from earlier precedent and which does not establish that trial court's action is void ab initio or that defendant's conduct was not subject to criminal punishment should be applied retroactively to all cases pending on direct review at time new decision is issued.

4. Courts ⇐100(1)

Retroactive application of rule of *State v. Elmore*, regarding presumption of malice from use of deadly weapon, would be limited to cases pending on direct appeal at time *Elmore* was decided.

5. Courts ⇐100(1)

Collateral attack of criminal conviction on basis of legal precedent that developed after conviction became final must be reserved for those cases in which trial court's action was without jurisdiction or is void because defendant's conduct is not subject to criminal sanction.

6. Homicide ⇐254

Death sentence could be imposed upon defendant who participated in armed robbery of store during which accomplice killed victim, where defendant attempted to kill store owner by shooting him in the chest, even though ultimate victim was someone other than the store owner. U.S.C.A. Const.Amend. 8.

7. Criminal Law ⇐29(1)

When two or more persons aid, abet and encourage each other in commission of a crime, all being present, each is guilty as a principal.

David I. Bruck, and S.C. Office of Appellate Defense, Columbia, for petitioner.

Atty. Gen. T. Travis Medlock, and Chief Deputy Atty. Gen. Donald J. Zelenka, Columbia, for respondents.

NESS, Chief Justice:

This case is before us on remand from the United States Supreme Court for reconsideration of Yates' petition for writ of habeas corpus. The petition is denied.

Yates was convicted of murder and armed robbery in 1981 and was sentenced to death upon recommendation of a jury. This Court affirmed the conviction and sentence. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. den., 462 U.S. 1124, 103 S.Ct. 3098, 77 L.Ed.2d 1356 (1983). Yates' application for post-conviction relief was denied, and he sought a writ of certiorari from this Court to review the decision of the circuit court. Yates also filed a petition for writ of habeas corpus in the original jurisdiction of this Court alleging, for the first time, constitutional error in the jury instructions at trial. The petitions were consolidated and both were denied by summary order. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). *Yates v. Aiken*, — U.S. —, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

At Yates' trial the jury was instructed that malice is presumed from the use of a deadly weapon. No objection to the charge was made, and the issue was not raised on direct appeal. Approximately one year after Yates' conviction was affirmed, this Court found error in a similar malice charge. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). The jury instruction at Yates' trial suffered from the same infirmities present in *Elmore* and addressed in *Francis v. Franklin*, *supra*.

The question we must resolve is whether *Elmore* may be applied retroactively to invalidate a conviction which was final at the time *Elmore* was decided. We have expressly stated that *Elmore*'s retroactive effect is limited to cases pending on direct appeal at the time that case was decided and will not apply to collateral attacks on criminal convictions. *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985). In light of the remand of this case, however, we take this opportunity to re-evaluate and expand on our holding in *McClary*.

Decisions from the United States Supreme Court regarding retroactive application of new rules of criminal law are a mass of confusion. Indeed, that Court has stated that the development of the law of retroactivity is "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 2584, 73 L.Ed.2d 202 (1982), citing *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 1172, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring). In applying those precedents at the state level to determine the retroactive effect of a prior state decision, one factor is controlling: "Retroactive application is not compelled, constitutionally or otherwise." *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). *See also, United States v. Johnson*, 102 S.Ct. at 2583, citing *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965); ["The Constitution neither prohibits nor requires ... retrospective effect' be given to any 'new' constitutional rule."], and citing *Great Northern R. Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ["'the federal constitution has no voice upon the subject' of retrospectivity."] In the absence of constitutional mandate, this Court is free to determine our own standards regarding retroactivity of state decisions.

While not binding on us, several of these decisions are instructive on the issue of retroactivity.

[1, 2] Prospective application should be afforded a new rule of criminal procedure which is a "clear break" from earlier precedent. *United States v. Johnson*, 102 S.Ct. at 2587, citing *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969). *See, e.g., Butzon v. Kentucky*, — U.S. —, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (White, J., and O'Connor, J., concurring in separate opinions; Burger, C.J., and Rehnquist, J., dissenting). *See also, State v. Hawkins*, South Carolina Supreme Court Order dated June 6, 1986 [applying *Butzon*

v. *Kentucky* prospectively from the date of the decision.] Full retroactivity, even by collateral attack, should be permitted when a ruling establishes that the trial court's action is void *ab initio* or that defendant's conduct was not subject to criminal punishment. *United States v. Johnson*, 102 S.Ct. at 2587, and cases cited therein. The gray area between these two bright line rules has resulted in the majority of litigation on this issue.

[3] We are persuaded by Justice Harlan's view that a new rule of criminal law which does not fall into one of the categories discussed above should be applied retroactively to all cases pending on direct review at the time the new decision is issued. *See, Desist v. United States*, *supra* (Harlan, J., dissenting); *Mackey v. United States*, *supra*, (Harlan, J., concurring) [adopted in *United States v. Johnson*, *supra*, as to new decisions arising under the Fourth Amendment.] *See also, Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1069, 84 L.Ed.2d 38, citing *United States v. Johnson*, 102 S.Ct. at 2584. This rule is, of course, subject to traditional standards of waiver and harmless error.[1] *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1070, 84 L.Ed.2d 38 (1985) at footnote 4. *Rose v. Rose*, 478 U.S. 1, 106 S.Ct. 2901, 92 L.Ed.2d 1 (1986).

Justice Harlan's view has several advantages. Retroactive effect of a new rule is appropriate when the purpose of the new rule is to "enhance the accuracy of criminal trials." *Solem v. Stumes*, 104 S.Ct. at 1342. On one hand, the Harlan approach avoids the problem of the Court becoming a "super-legislature," picking one case at random in which to announce a new rule, "then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule." *Shea v. Louisiana*, 105 S.Ct. at 1069. On the other hand, it prevents the illogical result of reversing, on collateral review, a decision on the basis of a rule of law which did not exist at the time the case was finally decided. *Henderson v. North Carolina*, 430 U.S. 232, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977) (Powell, J., concurring).

[4, 5] Accordingly, we adhere to our decision in *McClary* that the retroactive application of *Elmore* is limited to cases pending on direct appeal at the time *Elmore* was decided. Collateral attack of a criminal conviction on the basis of legal precedent that developed after the conviction became final must be reserved for those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction.

We realize that many factors affect the progress of a case through the judicial system, and the speed of appellate review will necessarily differ from case to case. Even under our view of the scope of retroactivity, it may be inevitable that some similarly situated defendants will be treated differently. *United States v. Johnson*, 102 S.Ct. at 2591, footnote 17. However, we believe our approach is less likely to result in inequitable treatment among similarly situated individuals than is the approach applied by the federal courts. "The distinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter the curtain of finality has not been drawn. Somewhere, the closing must come." *Shea v. Louisiana*, 105 S.Ct. at 1070.

[6] While we affirm Yates' conviction, we raise, *sua sponte*, the propriety of Yates' death sentence in light of the United States Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In that case, the Supreme Court held the Eighth Amendment forbids the imposition of the death penalty on "one who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed." *Id.* at 3376. *See, State v. Patterson & Stubbs*, 287 S.C. 244, 335 S.E.2d 800 (1985). Rather than remanding this case for a new sentencing proceeding, this Court may make its own review of the record to determine the factual questions raised by *Enmund*. *Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). *See also State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984).

Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood, and entered the store.

Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood, who was standing behind the store counter. Yates demanded money. Wood hesitated, and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed. He learned of their deaths after his arrest.

[7] Yates was found guilty of the murder of Mrs. Wood under the theory of the "hand of one, hand of all." When two or more persons aid, abet and encourage each other in the commission of a crime, all being present, each is guilty as a principal. *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971).

Enmund does not prevent a conviction of murder against one who did not actually take life. It does not "affect the state's definition of any substantive offense, even a capital offense." *Cabana v. Bullock*, 106 S.Ct. at 696, citing *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir.1984). Rather, its holding relates solely to the imposition of the death penalty upon one already convicted of murder as the state defines that offense.

We have little difficulty in finding that Yates attempted to kill and intended that life be taken. He attempted to kill Wood by shooting him in the chest. Even though the ultimate victim was someone other than the person Yates attempted to kill, Yates' intent is not diminished in any way. *State v. Gandy*, 283 S.C. 571, 324 S.E.2d 65 (1984). Therefore, Yates' death sentence is appropriate under the holding of *Enmund v. Florida*.

The petition for writ of habeas corpus is DENIED.

GREGORY, HARWELL and CHANDLER, JJ., concur.

FINNEY, J., dissents in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my view, the doctrine of retroactivity should not prevent this court from reviewing constitutional issues or court decisions affecting the truth-finding process when raised in collateral proceedings.

The majority opinion concludes that *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985) and *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985), support the concept of a limitation on the doctrine of retroactivity in the application of the principles enunciated in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), to those

1. *See also, Rose v. Clark*, — U.S. —, 106 S.Ct. 3101, 92 L.Ed.2d 460 [applying harmless error analysis in a collateral attack (habeas corpus) on an unconstitutional jury instruction without addressing the issue of retroactivity].

cases pending on direct appeal. The majority's attempt to distinguish between direct and collateral challenges in the application of the doctrine of retroactivity is, in my opinion, misplaced in cases where the alleged error affects the truth-finding function and particularly in those cases where the state seeks the ultimate punishment.

The majority justifies its distinction on the need to draw "the curtain of finality," citing *McClary v. State*, *supra*, and *Shea v. Louisiana*, *supra*. I would respectfully point out that neither *McClary* nor *Shea* was a death penalty case; and under South Carolina law in death penalty situations, we are required to conduct in favorem vitae review. The majority apparently overlooks or minimizes the finality of its decision in this case—death—where there is a strong possibility that the conviction was constitutionally infirm. The concern for finality that might otherwise dictate non-retroactive review of constitutional decisions on collateral attack should not override constitutional considerations in the instant case.

In *State v. Elmore*, *supra*, this court held that a presumption of malice from the use of a deadly weapon erroneously constituted a mandatory presumption rather than a permissive inference. In *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), this court found that such mandatory presumption is prejudicial and constitutes reversible error. These two decisions are in line with the decision of the Supreme Court of the United States, holding that erroneous instructions regarding a necessary element of an offense such as malice substantially impairs the truth-finding function of the jury. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

In *McClary v. State*, *supra*, the Supreme Court of South Carolina held that retroactive application of *State v. Elmore*, will be limited to those cases pending on direct appeal and will not apply to collateral attacks on criminal convictions. Prior to *McClary*, the Court allowed review of *Elmore*-type errors retroactively in *State v. Woods*, *supra*, *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983), and *State v. Llewellyn*, 281 S.C. 199, 314 S.E.2d 328 (1984). A reading of *McClary* shows that this court based its decision upon its understanding of *Shea v. Louisiana*, *supra*, whose reasoning the court adopted and presumably accepted as binding precedent. I would point out that the Supreme Court of the United States, in *Shea*, was concerned with a non-truth-finding error, whereas the error complained of in this case is clearly a truth-finding error.

The principles of retroactivity set forth in *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); and *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), provide a rational framework for applying new constitutional decisions retroactively. These decisions recognize that complete retroactive effect should be given, even when raised by collateral proceedings, to new constitutional rules whose major purpose is to overcome an aspect of the criminal trial that substantially impairs the truth-finding function and raises serious questions about the validity of guilty verdicts. This pronouncement of retroactivity is made particularly clear in *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), wherein the United States Supreme Court held:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.

See also *United States v. Johnson*, *supra*, and *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

The doctrine against burden shifting presumptions set out in *Francis v. Franklin*, *supra*, is not a clear break with prior law. The United States Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), decided prior to *Yates*, held that conclusive presumptions or instructions which shift the burden of persuasion violate the Fourteenth Amendment's requirement that in every criminal trial, the state is required to prove each element of the criminal offense beyond a reasonable doubt. The Court went on to hold, concerning *Elmore*-type errors, that conclusive presumptions conflict with the presumption of innocence with which the law endows the accused. These presumptions, likewise, extend to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury.

I also dissent because the majority, *sua sponte*, addresses the question of the propriety of Yates' death sentence in light of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); and without the benefit of briefs, oral arguments or consideration of any differences between Florida and South Carolina law dealing with the responsibility of persons who did not actually inflict the mortal wound, concludes that the death sentence was appropriate, relying upon *Cabana v. Bullock*, — U.S. —, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), and *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984); both of which are easily distinguishable.

I would reconsider and remand this case to the trial court for a new trial.

The Supreme Court of South Carolina

Dale Robert Yates, Petitioner,

v.

James Aiken, Warden, et al., Respondents.

ORDER

Dale Robert Yates has petitioned this Court for a writ of certiorari from the denial, after a hearing, of his application for post-conviction relief.

After careful consideration of this petition, we are of the opinion it should be denied.

We have also considered the petition for writ of habeas corpus and conclude it should be denied.

FOR THE COURT

Columbia, South Carolina

May 22, 1985

CERTIFIED TRUE COPY:

Clerk, S. C. Supreme Court

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-5193

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

DID JURY INSTRUCTIONS AT PETITIONER'S CAPITAL MURDER TRIAL WHICH ADVISED THE JURY THAT MALICE WAS REBUTTABLY PRESUMED OR IMPLIED (1) FROM THE USE OF A DEADLY WEAPON AND (2) FROM THE INTENTIONAL DOING OF AN UNLAWFUL ACT WITHOUT JUST CAUSE OR EXCUSE UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-5193

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Dale Robert Yates prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The per curiam order of the Supreme Court of South Carolina dated May 22, 1985 denying petitioner's Petition for Writ of Habeas Corpus is unreported, and is reprinted in the Appendix to this petition at A-1. The per curiam order of the Supreme Court of South Carolina dated June 6, 1985, granting a stay of execution for a period of sixty days within which to file this petition for writ of certiorari is unreported, and is reproduced infra at A-2.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on May 22, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code Sec. 16-3-10 (1984 Cum. Supp.), which provides:

> "Murder" is the killing of any person with malice aforethought, either express or implied.

STATEMENT OF THE CASE

The petitioner Dale Robert Yates and an accomplice, Henry Davis, robbed a country store. Petitioner was armed with a pistol and Davis with a knife. During the robbery, petitioner shot one of the proprietors, Willie Wood, in the hand, and then ran out of the store. At about that time, Mr. Wood's mother, Helen Wood, entered the store and was stabbed to death by petitioner's accomplice Davis. Mr. Wood then seized a pistol and shot Davis to death. Petitioner was convicted in a South Carolina state court of conspiracy, armed robbery, assault and battery with intent to kill against Willie Wood, and of the murder of Mrs. Wood.

Petitioner's defense to the murder charge at his trial was that he had abandoned the robbery prior to Mrs. Wood's arrival in the store, and that he had not intended that she be killed. Indeed, as the South Carolina Supreme Court recognized, petitioner had fled the store at about the time when Mrs. Wood arrived, State v. Yates, supra, 310 S.E.2d at 807, and petitioner insisted at trial that he had never even seen Mrs. Wood at any time before, during or after the crime. Transcript of Record, State v. Yates, supra (hereinafter cited as "Tr.") at 1103. The South Carolina Supreme Court summarized petitioner's trial testimony as having been to the effect that "he did not kill Mrs. Wood and that it was his intent all along to abandon the robbery without hurting anybody if the victim refused to co-operate." State v. Yates, supra, 310 S.E.2d at 808.

To convict petitioner of murder, the state was obligated under

South Carolina law to establish that he had killed Mrs. Wood with malice aforethought. S.C. Code Sec. 16-3-10 (1976). In order to establish petitioner's criminal liability for the homicidal act of his accomplice Davis, the prosecution relied on the law of parties, under which each member of an unlawful conspiracy is criminally liable for all of the acts of his co-conspirators. State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939), State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972).[1] This legal principle did not, however, relieve the state of the burden of establishing the element of petitioner's own malicious mental state beyond a reasonable doubt: petitioner's participation in a dangerous felony is not, under South Carolina law, a substitute for evidence of actual malice, but is merely a circumstance from which the jury is permitted to infer the existence of malice. See State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, 585 (1982).[2]

Since state law required the jury to determine whether the state had proven the element of malice beyond a reasonable doubt, the trial judge undertook to define express and implied malice for the jury. The malice instructions, in their entirety, were as follows:

> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought, and such proof must be beyond a reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words "express" and "implied" do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.
>
> Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in

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[1] In accordance with state law, the trial judge charged the jury that when two or more parties combine together to commit an dangerous unlawful act which results in death, "the hand of one is the hand of all," and all participating in the unlawful act are equally guilty of the murder. Tr. 1209.

[2] As pointed out by the South Carolina Supreme Court in its opinion affirming petitioner's conviction, the state did not rely on a felony-murder theory in its prosecution of petitioner. State v. Yates, supra, 310 S.E.2d at 808, 810.

wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before the commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be the combination of the previous evil intent and the act which produces the evil result.

Tr. 1207-1208 (emphasis added).

After hearing these instructions, the jury convicted petitioner of the murder of Mrs. Wood, as well as of the robbery and assault on Willie Wood. He was sentenced to death on the murder charge, and his convictions and death sentence were affirmed by the South Carolina Supreme Court. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1162 (1983).

Following the affirmance of petitioner's conviction, the South Carolina Supreme Court ruled that virtually identical instructions in two other capital cases had created burden-shifting mandatory presumptions of malice. State v. Elmore, 279 S.C. 781, 309 S.E.2d 781 (1983), State v. Woods, 282 S.C. 10, 316 S.E.2d 673 (1984). Based on the state court's recognition of this constitutional defect in the malice instructions given at his trial, petitioner filed a writ of habeas corpus in the South Carolina Supreme Court seeking vacation of his conviction for murder. Despite the state supreme court's recognition that the

holdings of Elmore and Woods were to be given retroactive effect, State v. Lewellyn, 281 S.C. 199, 314 S.E.2d 327 (1984), the court summarily denied the petition without opinion.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner did not object to the malice instructions at trial nor did he assign them as error on direct appeal. However, in affirming petitioner's conviction the South Carolina Supreme Court stated that while "[i]ssues not argued are normally not considered by this Court but in light of the penalty involved, we have considered all exceptions and the entire record to ascertain if there has been committed prejudicial error; we find none." State v. Yates, 280 S.C. 29, 310 S.E.2d 805, 814 (1982).[3] Subsequently, petitioner raised his objection to the malice instructions in a writ of habeas corpus in the South Carolina Supreme Court. S.C. Const. art. V, Sec. 5; S.C. Code Sec. 14-3-310 (1976). In his petition, he alleged that the malice instructions "created a mandatory presumption of malice which, although rebuttable, impermissibly shifted the burden of persuasion to the accused to rebut the presumption," and cited Sandstrom v. Montana, 442 U.S. 510 (1979) in support of his contention. Yates v. Aiken, Petition for Habeas Corpus at 2-3. In its Return, the respondent agreed with petitioner that the issue should be addressed on the merits, but denied that petitioner was entitled to relief.

On April 29, 1985, while his habeas corpus petition was pending before the South Carolina Supreme Court, this Court announced its decision in Francis v. Franklin, 105 S.Ct. 1965 (1985). Two days later, on May 1, 1985, petitioner filed a supplemental memorandum in the South Carolina Supreme Court in which he argued that the constitutional defects identified in Francis were equally present in the record of his case, and that Francis compelled vacation of his conviction. The respondent

[3] This statement by the South Carolina Supreme Court in petitioner's case is in keeping with South Carolina's consistent refusal to apply procedural bars to consideration of claims of legal error in death penalty cases. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981); State v. Gilbert, 273 S.C. 690, 258 S.E.2d 892 (1979).

filed no return to this supplemental memorandum. On May 22, the state Supreme Court issued an order stating in pertinent part that the justices had "considered the petition for writ of habeas corpus and conclude it should be denied." Infra at A-1.

THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S RECENT DECISION IN FRANCIS v. FRANKLIN.

"The threshold inquiry in ascertaining the kind of constitutional analysis applicable to this kind of jury instruction is to determine the nature of presumption it describes." Sandstrom v. Montana, 442 U.S. 510, 514 (1979). An examination of the instructions on malice in this case reveals that both of the presumptions employed here were rebuttable mandatory presumptions, as that term is used in County Court of Ulster County v. Allen, 442 U.S. 140 (1979).

The first of these presumptions--that arising from the intentional doing of an unlawful act--was preceded by language which suggested that the trial court was about to convey only a permissive inference of malice ("Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved."). However, immediately after this sentence the trial announced a presumption which was by its terms a mandatory one: "Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." (emphasis added). This instruction was not only expressly mandatory, but it also nullified the permissive character of the preceding sentence. This is so because the jury could only have reconciled the two instructions by reasoning that while some basic facts "may" give rise to the implication of malice, facts which show the intentional doing of an unlawful act are the type of facts which invariably do give rise to such an inference or presumption.

In this case, the practical effect of this instruction was to relieve the state of its burden of establishing petitioner's own malicious intent in the murder of Mrs. Wood once it had shown

that he had committed some unlawful act without just cause or excuse. Since petitioner admitted to participating in a robbery and to shooting at Willie Wood prior to abandoning the robbery and fleeing from the store, this presumption effectively assured his conviction unless he was able--as the rest of the instruction authorized him to attempt to do--to rebut the presumption of malice by proving that he did not actually possess the requisite malicious mental state with respect to Mrs. Wood's killing.[4]

The second presumption--that "malice is implied or presumed from the use of a deadly weapon"--is cast in slightly different terms, but is equally mandatory, and is surrounded by no permissive language at all. Nor was the effect of this instruction altered by the ensuing statement that the presumption is removed if "the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to," since the jury could only have concluded from this that unless all of these circumstances were reliably established, the jury was required to heed the presumption rather than the evidence, or lack of evidence, of malice.

The unconstitutionality of these instructions is now clearly established by the analysis employed by this Court in Francis v. Franklin, 105 S.Ct. 1965 (1985). Franklin, a prison escapee, killed a homeowner during an attempt to steal the victim's car. He was convicted of murder, defined under state law as causing

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[4]While such mandatory presumptions are not necessarily constitutionally impermissible, County Court of Ulster County v. Allen, 442 U.S. 140, 159 (1979), the presumption of malice involved here is irrational on its face because the basic facts from which malice is to be presumed are just as likely to be present in a killing that is not malicious as in one that is. For example, manslaughter, defined under South Carolina as "unlawful killing of another without malice," S.C. Code (16-3-50 (1984), requires an intentional homicidal act, State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978), and is neither justified nor excusable. The element of malice which distinguishes murder from manslaughter cannot be supplied "in the run of cases," County Court of Ulster County, supra, simply by proof of the intentional doing of an unlawful act without just cause or excuse, since such evidence would warrant a finding of malice in every intentional and unlawful homicide, regardless of the circumstances. Because such a presumption cannot be rationally applied to every such homicide, jury instructions must make clear, as the ones given in this case did not, that the so-called "presumption" of malice is actually nothing more than permissive inference which the jury is free to accept or reject depending on its view of the facts of the case as a whole.

the death of another "unlawfully and with malice aforethought, either express or implied." His defense at trial was that he had not intended to kill the victim, and that the gun had accidentally discharged. On the issue of intent, the trial judge instructed the jury that

> [t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probably consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Francis v. Franklin, supra, 105 S.Ct at 1970.

The Court affirmed the granting of federal habeas corpus relief in Francis upon the ground that these instructions "direct[ed] the jury to presume an essential element of the offense--intent to kill--upon proof of other elements of the offense--the act of slaying another." The Court concluded that the instructions were unconstitutional because they "'undermined the factfinder's responsibility at trial, based upon evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.'" Id. at 1972 (quoting County Court of Ulster County v. Allen, supra, 442 U.S. at 156) (emphasis added in Francis).

The Francis majority acknowledged that, unlike the challenged instruction in Sandstrom v. Montana, supra, the presumption of intent given at Franklin's trial was not conclusive. Rather, the trial judge twice instructed the jury that the presumptions of intent "may be rebutted." However, the Court noted that this distinction provided no basis upon which to uphold Franklin's conviction.

> A mandatory rebuttable presumption does not remove the presumed element from the case entirely if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional.

105 S.Ct. at 1972-1973.

The Court went on to examine certain other portions of the instructions given at Franklin's trial to determine whether the charge considered as a whole might pass constitutional muster despite the mandatory presumptions embodied in the challenged instructions. Immediately after the two instructions concerning the presumption of intent, the trial judge had instructed the jury that "[a] person will not be presumed to act with criminal intention . . ." In addition, he had repeatedly stressed that the burden of proof was on the state. Nevertheless, the Court found that the jury might reasonably have interpreted the charge as a whole to mean that "although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise." 105 S.Ct at 1974. As for the instruction that a person was not to be presumed to act with criminal intent, the Court observed that the jury might have understood this to refer to a different element of the offense than that referred to in the preceding instructions on the presumption of intent. Alternatively, the jury might simply have understood this instruction to contradict the mandatory presumption which immediately preceded it. Since "[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other . . . the jury was left in a quandary as to whether to follow that instruction or the immediately preceding one it contradicted." 105 S.Ct at 1975-1976. Under either interpretation, the Court was unable to conclude that the instructions could not have operated to shift the burden of proof in violation of the Due Process Clause.

Applying Francis to the case at bar, it is clear that the constitutional defects identified in Francis are equally present here. Petitioner's jury was instructed that an essential element of the offense of murder--malice--was implied or presumed "by the law" from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse, and was also "implied

or presumed" from the use of a deadly weapon. These presumptions, like the presumptions in Francis, were described as "rebuttable." As Francis now makes clear, this limitation on the effect of the presumptions does not render them any more constitutional than the conclusive presumption struck down in Sandstrom v. Montana, supra. Nor does any other portion of the instructions suffice to ensure, with the certainty that Francis requires, that the jury's deliberations were not affected by the mandatory presumptions contained in these instructions. Indeed, nowhere in the instructions given at petitioner's trial can any cautionary instruction be found comparable to the instruction in Francis that "a person will not be presumed to act with criminal intention." With respect to one of the two mandatory presumptions given here--the presumption of malice from the use of a deadly weapon--the trial judge did say that "when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed." But this instruction, much like the instruction on the "rebuttable" nature of the presumption, may well have exacerbated the constitutional defect by suggesting that the presumption of malice remained in effect unless and until it was overcome by the defendant. Francis v. Franklin, supra, 105 S.Ct. at 1975, n. 7. If the jury was not satisfied that the actual truth surrounding the use of the two weapons in this case had been testified to, and if the presumption of malice was not otherwise rebutted, the jury was required to find the element of malice to be proven simply on the basis of the presumption flowing from the use of the deadly weapon.

That Francis compels the result urged by petitioner in this case becomes all the more apparent when it is observed that in Francis the trial judge cautioned the jury, immediately before the portion of the charge containing the unconstitutional presumptions, that the burden of proof was on the state and that "there is no burden on the defendant to prove anything." Francis v. Franklin, supra, 105 S.Ct. 1978 (Powell, J. dissenting), 1981-1982 (Rehnquist, J., dissenting). A majority of the Court implicitly rejected the

state's argument in Francis that even this relatively emphatic language was sufficient to ensure that the jury would not be misled by the burden-shifting presumptions which immediately followed. In the case at bar, by contrast, no such instruction was given: the closest approximation contained in the burden-of-proof instructions given here was a simple statement that "[t]he defendant does not have to prove that he's innocent" and that the prosecution "must convince you, beyond a reasonable doubt, by evidence presented in this courtroom, of the guilt of the Defendant." Tr. 1202, lines 9-13. If the far more emphatic cautionary instruction given in Francis was insufficient to overcome the prejudicial impact of the unconstitutional presumptions in that case, it follows a fortiori that here, where no similar admonition concerning the burden of proof was given, due process requires that the conviction be reversed.

Finally, petitioner would note that the Francis court, while reserving the question of whether Sandstrom error can ever be disregarded as harmless, affirmed the conclusion of the Eleventh Circuit that the error could not be treated as harmless in any case where, as in Francis, the element of intent "'was plainly at issue.'" 105 S.Ct. at 1977 (quoting Francis v. Franklin, 720 F.2d 1206, 1212 (1983)). This observation is equally applicable to the element of malice in this case, since petitioner was not the actual slayer, and since he set up the defense of withdrawal, and vigorously disputed that he intended the victim's death--or indeed that he even knew of her presence at the scene.

For all of the forgoing reasons, petitioner submits that Francis v. Franklin entitles him to the relief which he seeks.

CONCLUSION

For the reasons set forth above, the writ should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

August ___, 1985

JOINT APPENDIX

No. 86-6060

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 19, 1986
CERTIORARI GRANTED MARCH 30, 1987

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

February 13, 1981	Petitioner arrested and charged with the murder of Helen Wood
April 9, 1981	Petitioner indicted for murder, armed robbery, assault and battery with intent to kill, and conspiracy
April 27, 1981	Commencement of petitioner's trial in Greenville County Court of General Sessions.
April 30, 1981	Petitioner convicted as charged.
May 2, 1981	Petitioner sentenced to death.
December 22, 1982	Conviction and sentence of death affirmed by South Carolina Supreme Court, *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982).
July 6, 1983	Certiorari denied, *Yates v. South Carolina*, 462 U.S. 1124 (1983).
October 6, 1983	Petitioner files application for post-conviction relief in the Greenville County Court of Common Pleas.
August 14, 1984	Post-conviction relief denied by order of Hon. C. Victor Pyle, Resident Judge, Thirteenth Judicial Circuit.
January 14, 1985	Petitioner files petition for writ of habeas corpus in the South Carolina Supreme Court challenging the constitutionality of the malice instructions given at his trial.
" " "	Petitioner files petition for writ of certiorari in the South Carolina Supreme Court seeking review of the denial of post-conviction relief, and moves to consolidate petition for writ of certiorari with petition for writ of habeas corpus.

February 14, 1984	Respondents file return in South Carolina Supreme Court stating that they do not oppose consolidation of petitions "to resolve the apparent issues," but opposing relief.
May 1, 1985	Petitioner files supplemental memorandum of law in South Carolina Supreme Court calling court's attention to *Francis v. Franklin.*
May 22, 1985	Petitions for writ of certiorari and for habeas corpus summarily denied by South Carolina Supreme Court in unpublished order.
June 7, 1985	South Carolina Supreme Court grants 60-day stay of execution to permit filing of petition for writ of certiorari in United States Supreme Court.
August 9, 1985	Petition for certiorari filed in United States Supreme Court seeking review of South Carolina Supreme Court's denial of habeas corpus relief.
October 15, 1985	United States Supreme Court grants petition for writ of certiorari, vacates judgment, and remands case to the South Carolina Supreme Court for further consideration in light of *Francis v. Franklin*, 471 U.S. 307 (1985) ; *Yates v. Aiken*, 472 U.S. ——, 106 S.Ct. 218 (1985).
December 17, 1985	South Carolina Supreme Court grants petitioner's motion for a briefing schedule and oral argument on remand.
March 26, 1986	Oral argument before South Carolina Supreme Court.

September 29, 1986	Opinion of South Carolina Supreme Court denying habeas corpus petition, *Yates v. Aiken*, 290 S.C. 232, 349 S.E.2d 84 (1986).
October 23, 1986	South Carolina Supreme Court grants 90-day stay of execution from September 29, 1986 to permit filing of petition for writ of certiorari in United States Supreme Court.

GREENVILLE COUNTY COURT
OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

DALE ROBERT YATES

EXCERPTS FROM JUDGE'S CHARGE TO JURY

April 30, 1986

* * * *

[Tr. 1200]

Ladies and gentlemen, a most important rule of evidence that obtains in this state is this: Any defendant who is charged with the commission of any crime and brought into this courtroom to answer for it is presumed by the law to be innocent, and that presumption of innocence would remain with him throughout the trial and even when you go to your jury room, and it would remain with him until the State has proven beyond a reasonable doubt that he is, in fact, guilty of one or more of the charges made against him.

I tell you that that burden of proof by the State and by which you must be convinced is made up or consists solely of the evidence which you have heard from that witness stand or exhibits which have been placed before you and which you will have with you in your jury room and, of course, the law as I explain it to you within the context of which the State must prove this guilt beyond a reasonable doubt. It is from evidence and testimony presented in this courtroom that you must be convinced beyond a reasonable doubt, before the presumption of innocence which clothes him from beginning to end of the trial could fall away from him. That is not merely a

theory that some lawyer thought of, it is a very substantial right that every citizen in South Carolina is entitled to.

I am confident that when you go to your jury room, you will give this Defendant the benefit of the presumption of his innocence.

Ladies and gentlemen, the burden of proving the charges made against this Defendant rests on the State of South Carolina; in this case Mr. Wilkins, who is the Solicitor here and his assistant, Mr. Traxler, are required by the law, that is, the burden that we are talking about; they are required to present to you evidence, exhibits, by cross-examination of any of the witnesses; they must present before you competent evidence which establishes, beyond a reasonable doubt, the material elements of each of these charges before you could convict the Defendant of any of these charges.

The Defendant does not have to prove that he's innocent. He does not have to disprove that he's guilty. The State must convince you, beyond a reasonable doubt, by evidence presented in this courtroom, of the guilt of the Defendant.

Ladies and gentlemen, reasonable doubt is a phrase that you have all heard, and it means the same thing in the law as it does in ordinary, everyday English language; that is, a doubt for which you have a real reason. However, that excludes fanciful doubts or whimsical doubts, because anyone could doubt any proposition if you wanted to, but reasonable doubt really means a substantial doubt for which an honest person seeking the truth can give a real reason. So, it's to that degree of proof that the State must prove the elements of these charges. When I begin explaining the individual elements to you, bear in mind that it's the State's burden to establish these to you by that degree of proof which I have just defined.

* * * *

[Tr. 1206]

I tell you that a deadly weapon, within the meaning of the law, is any object which can be readily and handily and easily put to use in inflicting personal injury on another person.

Ladies and gentlemen, the State also charges that on February 13th, the Defendant, Dale Yates, committed the crime of murder in Greenville County. Madam Foreman and ladies and gentlemen, murder is the unlawful killing of any human being with malice aforethought, either expressed or implied; that is the definition of murder in South Carolina.

In order to convict one of murder, the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought, and such proof must be beyond any reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words "express" or "implied" do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.

Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before a commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be a combination of previous evil intent and the act which produces the fatal result.

I tell you, however, that the State is not required to prove any motive for a particular killing.

Ladies and gentlemen, another principle of law which applies in this case, depending upon your view of the facts, it is for you to apply the law to the facts as you find them; and the question is whether this law would apply to the facts as you find them to be. If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present,

participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

The common purpose may not have been to kill and murder, but if it was unlawful, and in the execution of this unlawful common purpose involves the probable contingency of taking a human life, and during the commission of the unlawful purpose, a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

I charge you that the phrase "in the commission of" means and includes all acts committed by an accused which proximately lead to the accomplishment of the criminal purpose. The commission of a crime begins with the first direct act proximately leading to the accomplishment of the criminal purpose, and the commission of that crime ends when all participants have attained temporary safety from any pursuit.

A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

One who is joined in a common design to kill or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw, notwithstanding any at-

tempted withdrawal from the original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with resulting lack of responsibility for a homicide committed by a confederate.

I tell you, however, that withdrawal from the scene of the crime may be considered by you along with the other circumstances in determining whether the Defendant had, in fact, abandoned the common design and in whether the fact of his alleged abandonment of the common purpose had been communicated to his associate.

• • • •

SUPREME COURT OF SOUTH CAROLINA

No. 21835

THE STATE,

Respondent,

v.

DALE ROBERT YATES,

Appellant.

Dec. 22, 1982

PER CURIAM:

Appellant, Dale Robert Yates, was indicted and convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. After being found guilty of murder, the jury recommended at the second phase of the bifurcated trial, that he should die by electrocution. From these convictions and sentence, he appeals. The basic issue involved in the appeal is whether the death sentence should be carried out.

On February 12, 1981, David Loftis (not on trial), Henry Davis (killed in the robbery), and Appellant Yates talked about various places to rob and rode around in the car of Davis looking for a store which could be easily robbed. As a part of the plan, they borrowed a gun from the Appellant's brother. On the following day, February 13, they continued to ride around, casing places to rob. The Appellant and Davis left Loftis (who turned state's evidence) at a shopping mall and drove away with the pistol under the passenger's side of the front seat. The

Appellant and Davis subsequently entered Wood's rural store, by the Appellant's own testimony, for the purpose of committing armed robbery. Appellant was armed with the pistol and Davis with a knife. They demanded and received approximately $3,000 from Willie Wood, who was alone and in charge of the store operation. When Willie Wood failed to cooperate to the satisfaction of the robbers, the Appellant shot him, but not fatally. About that time, the mother of Willie Wood, who was the postmistress in the adjoining building, came upon the scene. The Appellant ran out of the store, taking the money and the gun. Davis remained in the store, and stabbed Mrs. Wood to death with his knife. Willie Wood succeeded in obtaining a gun and killed Davis. After Appellant waited in Davis' car and concluded that Davis had been caught, he drove off, hid the money and pistol in a wooded area, and was later apprehended.

The Appellant testified in his own behalf. His testimony was not inconsistent with the facts recited above. It was his contention that he did not kill Mrs. Wood and that it was his intent all along to abandon the robbery without hurting anybody if the victims refused to cooperate.

The Appellant has stated forty exceptions in quest of a reversal of the convictions and sentence. These exceptions have been argued in the form of twenty questions as included in the Appellant's Brief.

The first three questions submit error on the part of the trial judge in (1) qualifying jurors Volpe, Wallace, Springfield, and Trammell, (2) in excusing certain jurors because of their opposition to capital punishment, and (3) refusing to excuse prospective jurors because of their response to *voir dire* questions. We have reviewed the relevant portions of the record dealing with these exceptions and the jurors involved. The interrogations of jurors must be considered as a whole. The qualifications should not be determined on the basis of isolated questions

and answers not truly meaningful. The judge must exercise his discretion in qualifying and excusing jurors. We find no error. Certainly, there is no abuse of discretion. Appellant's rights, under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) have not been violated. Principles enunciated in that case have been respected and applied.

Next, Appellant asserts that the trial court erred in denying the motions for change of venue, a change of forum and for additional peremptory challenges. The first two of these are discretionary; peremptory challenges are controlled by statute. We find no showing that this discretion has been abused or that Appellant has suffered from actual juror prejudice. *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981), *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981). The trial court properly denied these motions.

Early on, we point out that throughout the trial, the prosecuting attorney made it clear that he was not prosecuting the Appellant on the theory of a felony murder. It was his contention that both Appellant Yates and deceased Davis were present aiding and abetting each other in the commission of a planned armed robbery and that the hand of one was the hand of all. The judge charged the law of common law murder applicable in this state.

Appellant argues that the trial court erred in denying his motion to strike armed robbery as an aggravating circumstance. The possibility that Appellant was convicted on a theory of vicarious liability and then sentenced to death based upon the aggravating circumstances of armed robbery which was the foundation of the original murder conviction is asserted by Appellant to be reversible error.

The trial judge in the penalty phase of the trial instructed the jury that the only statutory aggravating circumstance which they were to consider was the murder

which was committed while the Defendant was in commission of the crime of robbery while armed with a deadly weapon. This is a statutory aggravating circumstance pursuant to South Carolina Code § 16-3-20(C)(a)(1)(e) (Cum.Supp.1981). Since this state adheres to the common law rule of murder and makes no distinction between murder and felony murder, a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder. *State v. Thompson, supra.* The Appellant is equally responsible for the stabbing death of Mrs. Wood, even though he did not actually cast the fatal blows. Appellant and Henry Davis entered the store armed and did commit a robbery. As a direct result of their joint actions in committing the armed robbery, Mrs. Wood was killed.

That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. *Lockett v. Ohio*, 438 U.S. 586, 602, 98 S.Ct. 2954, 2963, 57 L.Ed.2d 973 (1978).

There was no error in the trial judge's denying Appellant's motion to strike armed robbery as an aggravating circumstance.

Appellant further argues that the trial court erred in denying Appellant's motion to authorize the spending of certain state funds pursuant to South Carolina Code § 16-3-26(C) for a jury selection expert and for an expert as to the non-deterrent effect of capital punishment.

The decision of the amount of statutory funds to be expended rests in the discretion of the trial judge. This court will not disturb such decisions absent a showing of an abuse of that discretion. Appellant requested a five-hundred dollar fee for a jury selection expert. This expert stated that he would provide his expertise regardless

of whether or not the court ordered the payment of his fee. His services were available in spite of the lower court's refusal to authorize such funds.

We are of the opinion that the trial judge did not abuse his discretion in denying these requests. This statute does not require the trial judge to honor every request made by defense counsel. But only those requests that ". . . are reasonably necessary for the representation of the defendant. . . ." The court is empowered to decide which requests are appropriate. No error.

Appellant asserts that the trial court erred in allowing the Solicitor to express his opinion of the deterrent effects of capital punishment in argument to the jury. In reviewing this argument, as a whole, we find the argument to be within the perimeters permitted by this Court. The Solicitor's argument was acceptable and well within the confines as set forth by the lower court. The trial judge stated before these arguments that both sides would be allowed wide latitude in arguing their respective positions concerning the deterrent effect of capital punishment.

Appellant challenges the trial court's refusal to enjoin the Solicitor from seeking the death penalty in his case. Appellant based this challenge on the prosecutor's record of handling previous death penalty cases involving triggermen and non-triggermen. A triggerman is the person who actually fires the fatal shots or uses the deadly weapon to cause a death. Appellant argues that the Solicitor normally sought the death penalty only against the triggerman.

It would be error for the trial judge to tell a Solicitor how to determine whether the death penalty should be sought. This is the prerogative of the Solicitor. The exception is without merit.

Appellant's motion seeking to prevent pre-trial press coverage of the preliminary hearing was properly denied by the magistrate in question. Appellant has failed to

show any actual prejudice by the press coverage or the magistrate's handling of this one limited purpose phase of the trial.

The trial judge's finding of ". . . fact beyond any reasonable doubt that this defendant is competent to stand trial . . ." is well supported by ample evidence before the lower court. Appellant's exception as to his competency to stand trial is without merit.

Appellant asserts that it was error for the trial court to deny his request for separate juries in the guilt and penalty phase of the trial. Also, it was error to excuse potential jurors who were opposed to the death penalty. The death penalty statute in South Carolina does not contemplate or provide for two separate juries in such a trial. This court has resolved the issue of disqualifying jurors who oppose the death penalty adversely to the Appellant in *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981) and *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980).

When Appellant was testifying in his own behalf, the State, at cross-examination, was allowed for purpose of impeachment to introduce Appellant's prior criminal record as follows: two indictments involving house-breaking and larceny; four indictments charging the crime of larceny; and four indictments charging arson. It is uncontested that the house-breaking and larceny charges were appropriate. Appellant urges, however, that the court erred in allowing in evidence the four charges involving arson. They involved the burning of three barns and a hut. All of these were relevant on the credibility issue. Offenses involving moral turpitude are permitted but those not involving moral turpitude should be excluded. Whether a particular offense constitutes a crime of moral turpitude has been developed in South Carolina on a case by case basis as a matter of common law. The traditional definition of moral turpitude is:

> . . . an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. . . . *State v. Horton*, 271 S.C. 413, 248 S.E.2d 263 (1978)

We hold that arson involves an act of baseness, vileness and depravity. Grand larceny is beyond question an offense involving moral turpitude. There is involved the usurpation of another's personal property with intent to commit it to the use of the taker. Arson, like vandalism, is, in many senses of the word, more reprehensible. It involves the destruction of the property of another with not only the intent to deprive the true owner of its use but to also deprive any other person of its use and benefits. We hold that the trial judge correctly admitted the conviction of arson for the limited purpose of impeaching the witness.

Appellant requested by way of discovery an out of court statement made by Willie Wood. The trial court obtained a copy of this statement and advised Appellant's counsel: "I'll give it to you if you need it." The statement contained the same basic facts as testified by Mr. Wood during the trial. The information within the statement is consistent with the indictment and trial testimony. The Appellant was not deprived of information of which he was not already aware and which was actually available to him.

Appellant argues that the lower court erred by failing to direct a verdict for Appellant as to the murder count. We disagree. The evidence must be viewed in light most favorable to the State and any evidence, direct or circumstantial, reasonably tending to prove guilt of the accused, creates a jury issue. *State v. Hall*, 268 S.C. 390, 395, 234 S.E.2d 219, 221, *cert. denied*, 434 U.S. 870, 98 S.Ct. 211, 54 L.Ed.2d 147 (1977).

Appellant and Henry Davis planned and jointly executed an armed robbery. The Appellant was armed at the time of the robbery with a pistol which he used to shoot Mr. Wood, from whom money was taken. Appellant drove away only after he (Appellant) thought Davis had been caught. Meanwhile, Davis had stabbed Mrs. Wood to death.

"One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Woomer*, 276 S.C. 258, 277 S.E.2d 696 (1981). *State v. Hicks*, 257 S.C. 279, 284, 185 S.E.2d 746, 748 (1971). South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981), citing *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715 (1946). The evidence made a jury issue as to the murder charge.

Appellant asserts as error the trial judge's refusal to charge the state's request number 3, concurred in by the Appellant, which set forth a theory of felony murder. As stated above, the state did not proceed on the felony murder theory. The proposed charge was not a correct statement of the law applicable to the present case. The trial judge must determine the law to be charged from the evidence presented. *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). We are of the opinion that the trial judge correctly and precisely determined the applicable law and charged it.

The Appellant requested the trial judge to charge the jury as a mitigating circumstance: "That Dale Robert Yates did not kill the victim Helen Wood." This request was made incident to the penalty phase charge of the bifurcated trial after Appellant had already been convicted of murder. The judge very properly told counsel, in lieu of granting the request, "you may argue it [to the jury] all you wish to." Presumably, counsel did exactly that.

The fact that Yates did not do the stabbing personally was one of the facts upon which counsel relied in hopes of obtaining a life sentence. Instead of charging the jury in the language suggested by counsel, the judge submitted a charge which was reduced to writing and taken to the jury room, as required by the code, which reads as follows:

> Secondly, the Defendant asks you to consider that the Defendant was an accomplice to the murder, committed by another person, and his participation was relatively minor. In other words, that embraces the theory that the Defendant did not, himself, personally strike the fatal blow.

The charge, first orally and then in writing, to the jury, let it know that it should give consideration to the fact that Yates did not personally stab Mrs. Wood. The thought counsel wished the judge to convey was actually given to the jury, although not in the exact verbiage requested. We find no error.

The next issue submitted to the Court involves the application of a portion of § 16-3-20(C) (Cum.Supp. 1981), which reads as follows:

> Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment.

After the jury had deliberated for approximately fifty minutes whether the Appellant should receive a life sentence or a death sentence, the foreman reported that the jury was deadlocked. The judge, in a brief statement, said: ". . . I would not conclude that after the length of

time which you have deliberated that you have given due and thorough deliberation to the matter before you, and I am going to ask you to return to the jury room and continue your deliberations." The jury complied and returned approximately two and one-half hours later with a verdict recommending the death penalty. Appellant contends that the trial judge should have told the jury that if it was not capable of breaking the deadlock, the court would impose a life sentence. This same issue was before this Court and was settled in *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981). The words of the Court are equally applicable here. We said:

> The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

The last questions raised by the Appellant call upon this Court to perform the duty imposed upon it by § 16-3-25(C) of our Code. In addition to the traditional alleged errors of law which the Court must rule upon, the statute imposes upon the Court, the duty to

> . . . [C]onsider the punishment. . . .
> . . .
> (C) With regard to the sentence, the court shall determine:
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

It is the contention of the Appellant that this Court should vacate his death sentence because it was influenced by passion, prejudice and arbitrary factors and that the sentence of death was excessive or disproportionate to the penalty imposed in similar cases when both the crime and the defendant are considered. We discussed the duty of the Court under the statutory requirements in the case of *State v. Copeland, et al.*, 278 S.C. 572, 300 S.E.2d 63 (1982), to which reference is made. While the duty imposed is a difficult one because no two defendants and no two crimes are exactly alike, it is not an unsurmountable chore. Prior to imposition of sentence, the trial judge, who heard the entire case, made this finding:

> Mr. Yates, as the trial judge in the case just concluded in which you are indicted for the crime of murder, prior to imposing the death sentence upon you, I find as an affirmative fact beyond any reasonable doubt that the evidence warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion, or any other arbitrary factor.

The totality of the record abundantly supports the trial judge's finding. We agree that the evidence warrants the death penalty and our independent finding and conclusion is that the penalty was not the result of prejudice, passion or any other arbitrary factor.

The Appellant emphasizes more particularly his contention that the sentence is disproportionate to penalties imposed in similar cases. He argues that he personally did not stab and cause the death of Mrs. Wood. He testified during the trial that at the time of her death he

was not in the store but had departed to the getaway car.

While the case of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) had not been decided at the time of the trial, it has been argued orally and we consider it in the light of Appellant's reliance upon it. In *Enmund*, Sampson and Jeannette Armstrong went to the backdoor of the house of Thomas and Eunice Kersey. Sampson Armstrong grabbed Mr. Kersey, pointed a gun at him and told Jeannette Armstrong to take his money. Mr. Kersey, pointed a gun at him and told Jeannette Armstrong to take his money. Sampson Armstrong, and perhaps Jeannette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, took their money and fled. Enmund was at that time in a parked car approximately two hundred yards from the house. He was the getaway man. After the Supreme Court of Florida affirmed Enmund's conviction of murder and his death penalty, the Supreme Court of the United States granted *certiorari* to determine ". . . whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life nor intended to take life." The gravamen of the holding that Enmund's death penalty was impermissibly excessive under the Eighth Amendment of the United States Constitution is to be found in the following language of the Court:

> Here the robbers did commit murder, but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence,"

Lockett v. Ohio, 438 U.S. 586, 605 [98 S.Ct. 2954, 2965, 57 L.Ed.2d 973] (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U.S. 280, 304 [96 S.Ct. 2978, 2991, 49 L.Ed.2d 944] (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

. . . .

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

. . . .

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

The difference between the culpability of Enmund and the culpability of the Appellant is readily apparent. The culpability is different because the degree of participation was different. Enmund expected the Armstrongs to rob the Kerseys, bring the money to the car and that all would depart. On the other hand, Appellant Yates possessed the more potent weapon, a gun, and failed to kill Willie Wood merely because his aim was less than perfect. It is of little significance that the life he intended to take and attempted to take was that of Willie Wood instead of his mother, who was actually stabbed. We have no difficulty in differentiating the case at hand from that of *Enmund*.

There can be no serious doubt but that the evidence cited hereinabove together with the remainder of the record, amply supports the jury's findings of a statutory aggravating circumstances as enumerated in § 16-3-20 of our Code. Section 16-3-20(C)(a) defines one of the aggravating circumstances as follows:

> (1) Murder was committed while in the commission of the following crimes or acts:
>
> . . . (e) robbery while armed with a deadly weapon, . . .

This aggravating circumstance was proven by the Appellant's own testimony. There are no offseting mitigating circumstances of consequence.

In determining whether or not the sentence here imposed is excessive or disproportionate in light of the crime and the defendant, this Court has reviewed the entire record. We have also considered the circumstances of *State v. Gilbert*, 277 S.C. 53, 283 S.E.2d 179, *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 863, the only prior holding of this Court suitable for comparison. In that case, the two defendants, Gilbert and Gleaton, spent a morning cruising in search of a target to rob. The

same preclude to crime also appears in the record of *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458, rehearing denied 457 U.S. 1112, 102 S.Ct. 2917, 73 L.Ed.2d 1323. In the instant case, appellant with Davis and Loftis apparently contemplated robbery for over a day, making a diligent search of Greenville County for just the right setting. Indeed, Loftis, one of the accomplices, withdrew from the enterprise before the actual robbery and testified to this lengthy prologue.

As in *Gilbert*, *supra*, Appellant and his cohort, Davis, found a solitary, apparently unarmed victim in Mr. Wilile Wood. In almost every respect, the robbery unfolded as in the case of Gilbert and Gleaton with one assailant wielding a knife and the other a pistol. Mr. Wood was directed to lean over the store counter by Davis who appeared ready to stab him with the knife. At this point, however, the victim refused to obey. At Davis' command, the Appellant fired two bullets at Wood from close range and fled. From this a jury could conclude beyond a reasonable doubt that Appellant fully intended Wood's death, either by Davis' hand or his own, in the course of this armed robbery.

Hereafter the facts diverge from our previous cases. Mr. Wood did not die from his wound but instead seized his own gun and fought off Davis. Willie Wood's sixty-eight year-old mother then came upon the scene and was stabbed to death by Davis, who in turn was shot and killed by Wood. Although this outcome sets the instant case apart from previous capital sentences we have affirmed, it is sufficient for our purposes that the Appellant displayed the same intent and followed the same pattern of preparation as Gilbert, Gleaton and Thompson before him.

In mitigation, Appellant offered his own testimony and that of his mother. The jury learned that Appellant had

been a poor student in school, achieving basically a ninth grade education. In Appellant's own words, he was more interested in "getting out and having fun, shooting pool." If given a life sentence, however, he intended to write a book, study, and improve the prison system. Appellant frankly conceded that he had not managed to do these things during ten previous periods of incarceration. Both Appellant and his mother testified generally that he had some history of drug abuse and that, most importantly, he allowed himself to be influenced by Davis, the deceased accomplice. Appellant did not contend, however, that he was actually inebriated at the time of the robbery nor that Henry Davis forced him to participate.

The trial judge meticulously instructed the jury on the available circumstances under § 16-3-20(C)(b)(1), (4), (5) and (7). In addition, the trial court orally and in writing directed the jury to consider any other mitigating circumstances presented by the defendant.

In our view, the Appellant had the benefit of every reasonable explanation for his acts. We are satisfied that the jury properly found the aggravating circumstances of robbery while armed with a deadly weapon and did so without any influence of passion, prejudice or other arbitrary factor. The testimony in mitigation is comparable to that in *State v. Gilbert*, *supra*, if not somewhat less impressive, given the claim of Gilbert and Gleaton that they had partaken of drugs and were acting solely on impulse. We are satisfied that the penalty here imposed is neither excessive nor disproportionate in light of this crime and this defendant. Given that we have upheld a comparable sentence in the comparable case of *State v. Gilbert*, *supra*, we are confident that the finding of this jury represents consistent application of the ultimate sanction in this category of capital crime.

As indicated hereinabove, Appellant has filed forty exceptions in quest of a reversal. Many have not been

argued and some have admittedly been abandoned. Issues not argued are normally not considered by this Court but in light of the penalty involved, we have considered all exceptions and the entire record to ascertain if there has been committed prejudicial erorr; we find none. The convictions and sentence of the Appellant, Dale Robert Yates, are, accordingly,

AFFIRMED.

THE SUPREME COURT OF SOUTH CAROLINA

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, *et al.*,
Respondents.

ORDER

Dale Robert Yates has petitioned this Court for a writ of certiorari from the denial, after a hearing, of his application for post-conviction relief.

After careful consideration of this petition, we are of the opinion it should be denied.

We have also considered the petition for writ of habeas corpus and conclude it should be denied.

/s/ [Illegible], C.J.
For the Court

Columbia, South Carolina

May 22, 1985

SUPREME COURT OF THE UNITED STATES

No. 85-5193

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

ON CONSIDERATION of the motion of petitioner for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered that the motion to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

October 15, 1985

SUPREME COURT OF THE UNITED STATES

No. 85-5193

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the Supreme Court of South Carolina for further consideration in light of *Francis* v. *Franklin*, 471 U.S. —— (1985).

October 15, 1985

SUPREME COURT OF SOUTH CAROLINA

No. 22614

DALE ROBERT YATES,
Petitioner,

v.

JAMES AIKEN, WARDEN, CCI, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

Heard March 26, 1986

Decided Sept. 29, 1986

NESS, Chief Justice:

This case is before us on remand from the United States Supreme Court for reconsideration of Yates' petition for writ of habeas corpus. The petition is denied.

Yates was convicted of murder and armed robbery in 1981 and was sentenced to death upon recommendation of a jury. This Court affirmed the conviction and sentence. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. den., 462 U.S. 1124, 103 S.Ct. 3098, 77 L.Ed.2d 1356 (1983). Yates' application for post conviction relief was denied, and he sought a writ of certiorari from this Court to review the decision of the circuit court. Yates also filed a petition for writ of habeas corpus in the original jurisdiction of this Court alleging, for the first time, constitutional error in the jury instructions at trial. The petitions were consolidated and both were denied by summary order. The United

States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). *Yates v. Aiken*, —— U.S. ——, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

At Yates' trial the jury was instructed that malice is presumed from the use of a deadly weapon. No objection to the charge was made, and the issue was not raised on direct appeal. Approximately one year after Yates' conviction was affirmed, this Court found error in a similar malice charge. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). The jury instruction at Yates' trial suffered from the same infirmities present in *Elmore* and addressed in *Francis v. Franklin, supra.*

The question we must resolve is whether *Elmore* may be applied retroactively to invalidate a conviction which was final at the time *Elmore* was decided. We have expressly stated that *Elmore's* retroactive effect is limited to cases pending on direct appeal at the time that case was decided and will not apply to collateral attacks on criminal convictions. *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985). In light of the remand of this case, however, we take this opportunity to re-evaluate and expand on our holding in *McClary*.

Decisions from the United States Supreme Court regarding retroactive application of new rules of criminal law are a mass of confusion. Indeed, that Court has noted that the development of the law of retroactivity is "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 2584, 73 L.Ed.2d 202 (1982), citing *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 1172, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring). In applying those precedents at the state level to determine the retroactive effect of a

prior state decision, one factor is controlling. "Retroactive application is not compelled, constitutionally or otherwise." *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). *See also, United States v. Johnson*, 102 S.Ct. at 2583, citing *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965); ["'The Constitution neither prohibits nor requires . . . retrospective effect' be given to any 'new' constitutional rule."]; and citing *Great Northern R. Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ["'the federal constitution has no voice upon the subject' of retrospectivity."] In the absence of constitutional mandate, this Court is free to determine our own standards regarding retroactivity of state decisions.

While not binding on us, several of these decisions are instructive on the issue of retroactivity.

Prospective application should be afforded a new rule of criminal procedure which is a "clear break" from earlier precedent. *United States v. Johnson*, 102 S.Ct. at 2587, citing *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969). *See, e.g., Batson v. Kentucky*, —— U.S. ——, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (White, J., and O'Connor, J., concurring in separate opinions; Burger, C.J., and Rehnquist, J., dissenting). *See also State v. Hawkins*, South Carolina Supreme Court Order dated June 6, 1986 [applying *Batson v. Kentucky* prospectively from the date of the decision.] Full retroactivity, even by collateral attack, should be permitted when a ruling establishes that the trial court's action is void *ab initio* or that defendant's conduct was not subject to criminal punishment. *United States v. Johnson*, 102 S.Ct. at 2587, and cases cited therein. The gray area between these two bright line rules has resulted in the majority of litigation on this issue.

We are persuaded by Justice Harlan's view that a new rule of criminal law which does not fall into one of the categories discussed above should be applied retroactively to all cases pending on direct review at the time the new decision is issued. *See, Desist v. United States, supra* (Harlan, J., dissenting); *Mackey v. United States, supra*, (Harlan, J., concurring) [adopted in *United States v. Johnson, supra*, as to new decisions arising under the Fourth Amendment.] *See also, Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1069, 84 L.Ed.2d 38, citing *United States v. Johnson*, 102 S.Ct. at 2594. This rule is, of course, subject to traditional standards of waiver and harmless error.[1] *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 1070, 84 L.Ed.2d 38 (1985) at footnote 4; *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

Justice Harlan's view has several advantages. Retroactive effect of a new rule is appropriate when the purpose of the new rule is to "enhance the accuracy of criminal trials." *Solem v. Stumes*, 104 S.Ct. at 1342. On one hand, the Harlan approach avoids the problem of the Court becoming a "super-legislature," picking one case at random in which to announce a new rule, "then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule." *Shea v. Louisiana*, 105 S.Ct. at 1069. On the other hand, it prevents the illogical result of reversing, on collateral review, a decision on the basis of a rule of law which did not exist at the time the case was finally decided. *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.E.2d 306 (1977) (Powell, J., concurring).

Accordingly, we adhere to our decision in *McClary* that the retroactive application of *Elmore* is limited to

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[1] *See also, Rose v. Clark*, —— U.S. ——, 106 S.Ct. 3101, 92 L.Ed. 2d 460 [applying harmless error analysis in a collateral attack (habeas corpus) on an unconstitutional jury instruction without addressing the issue of retroactivity].

cases pending on direct appeal at the time *Elmore* was decided. Collateral attack of a criminal conviction on the basis of legal precedent that developed after the conviction became final must be reserved for those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction.

We realize that many factors affect the progress of a case through the judicial system, and the speed of appellate review will necessarily differ from case to case. Even under our view of the scope of retroactivity, it may be inevitable that some similarly situated defendants will be treated differently. *United States v. Johnson*, 102 S.Ct. at 2591, footnote 17. However, we believe our approach is less likely to result in inequitable treatment among similarly situated individuals than is the approach applied by the federal courts. "The distinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come." *Shea v. Louisiana*, 105 S.Ct. at 1070.

While we affirm Yates' conviction, we raise, *sua sponte*, the propriety of Yates' death sentence in light of the United States Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982). In that case, the Supreme Court held the Eighth Amendment forbids the imposition of the death penalty on "one who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed." *Id.* at 3376. *See, State v. Peterson & Stubbs*, 287 S.C. 244, 335 S.E.2d 800 (1985). Rather than remanding this case for a new sentencing proceeding, this Court may make its own review of the record to determine

the factual questions raised by *Enmund*. *Cabana v. Bullock*, —— U.S. ——, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). See also *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984).

Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood, and entered the store.

Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood, who was standing behind the store counter. Yates demanded money. Wood hesitated, and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed. He learned of their deaths after his arrest.

Yates was found guilty of the murder of Mrs. Wood under the theory of the "hand of one, hand of all." When two or more persons aid, abet and encourage each other in the commission of a crime, all being present, each is

guilty as a principal. *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971).

Enmund does not prevent a conviction of murder against one who did not actually take life. It does not "affect the state's definition of any substantive offense, even a capital offense." *Cabana v. Bullock*, 106 S.Ct. at 696, citing *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir. 1984). Rather, its holding relates solely to the imposition of the death penalty upon one already convicted of murder as the state defines that offense.

We have little difficulty in finding that Yates attempted to kill and intended that life be taken. He attempted to kill Wood by shooting him in the chest. Even though the ultimate victim was someone other than the person Yates attempted to kill, Yates' intent is not diminished in any way. *State v. Gandy*, 283 S.Ct. 571, 324 S.E.2d 65 (1984). Therefore, Yates' death sentence is appropriate under the holding of *Enmund v. Florida*.

The petition for writ of habeas corpus is

DENIED.

GREGORY, HARWELL and CHANDLER, JJ., concur.

FINNEY, J., dissents in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my view, the doctrine of retroactivity should not prevent this court from reviewing constitutional issues or court decisions affecting the truth-finding process when raised in collateral proceedings.

The majority opinion concludes that *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985) and *McClary v. State*, 287 S.C. 160, 337 S.E.2d 218 (1985), support the concept of a limitation on the doctrine of retroactivity in the application of the principles enunci-

ated in *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), to those cases pending on direct appeal. The majority's attempt to distinguish between direct and collateral challenges in the application of the doctrine of retroactivity is, in my opinion, misplaced in cases where the alleged error affects the truth-finding function and particularly in those cases where the state seeks the ultimate punishment.

The majority justifies its distinction on the need to draw "the curtain of finality," citing *McClary v. State*, *supra*, and *Shea v. Louisiana*, *supra*. I would respectfully point out that neither *McClary* nor *Shea* was a death penalty case; and under South Carolina law in death penalty situations, we are required to conduct in favorem vitae review. The majority apparently overlooks or minimizes the finality of its decision in this case—death—where there is a strong possibility that the conviction was constitutionally infirm. The concern for finality that might otherwise dictate non-retroactive review of constitutional decisions on collateral attack should not override constitutional considerations in the instant case.

In *State v. Elmore*, *supra*, this court held that a presumption of malice from the use of a deadly weapon erroneously constituted a mandatory presumption rather than a permissive inference. In *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), this court found that such mandatory presumption is prejudicial and constitutes reversible error. These two decisions are in line with the decision of the Supreme Court of the United States, holding that erroneous instructions regarding a necessary element of an offense such as malice substantially impairs the truth-finding functions of the jury. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

In *McClary v. State*, *supra*, the Supreme Court of South Carolina held that retroactive application of *State*

v. Elmore, will be limited to those cases pending on direct appeal and will not apply to collateral attacks on criminal convictions. Prior to *McClary*, the Court allowed review of *Elmore*-type errors retroactively in *State v. Woods*, *supra*, *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983), and *State v. Llewellyn*, 281 S.C. 199, 314 S.Ed.2d 326 (1984). A reading of *McClary* shows that this court based its decision upon its understanding of *Shea v. Louisiana*, *supra*, whose reasoning the court adopted and presumably accepted as binding precedent. I would point out that the Supreme Court of the United States, in *Shea*, was concerned with a non-truth-finding error, whereas the error complained of in this case is clearly a truth-finding error.

The principles of retroactivity set forth in *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed. 2d 202 (1982); and *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), provide a rational framework for applying new constitutional decisions retroactively. These decisions recognize that complete retroactive effect should be given, even when raised by collateral proceedings, to new constitutional rules whose major purpose is to overcome an aspect of the criminal trial that substantially impairs the truth-finding function and raises serious questions about the validity of guilty verdicts. This pronouncement of retroactivity is made particularly clear in *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), wherein the United States Supreme Court held:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.

See also *United States v. Johnson*, *supra*, and *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

The doctrine against burden shifting presumptions set out in *Francis v. Franklin*, *supra*, is not a clear break with prior law. The United States Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), decided prior to *Yates*, held that conclusive presumptions or instructions which shift the burden of persuasion violate the Fourteenth Amendment's requirement that in every criminal trial, the state is required to prove each element of the criminal offense beyond a reasonable doubt. The Court went on to hold, concerning *Elmore*-type errors, that conclusive presumptions conflict with the presumption of innocence with which the law endows the accused. These presumptions, likewise, extend to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury.

I also dissent because the majority, *sua sponte*, addresses the question of the propriety of Yates' death sentence in light of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); and without the benefit of briefs, oral arguments or consideration of any differences between Florida and South Carolina law dealing with the responsibility of persons who did not actually inflict the mortal wound, concludes that the death sentence was appropriate, relying upon *Cabana v. Bullock*, —— U.S. ——, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), and *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984), both of which are easily distinguishable.

I would reconsider and remand this case to the trial court for a new trial.

SUPREME COURT OF THE UNITED STATES

No. 86-6060

DALE ROBERT YATES,
Petitioner

v.

JAMES AIKEN, WARDEN, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF THE STATE OF SOUTH CAROLINA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 30, 1987

PETITIONER'S

BRIEF

(5)

No. 86-6060

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR PETITIONER

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QUESTION PRESENTED

May South Carolina avoid compliance with this Court's previous order requiring reconsideration of Petitioner's case in light of *Francis* v. *Franklin* by declaring the constitutional principles of *Francis* to be non-retroactive?

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The opinion of the Supreme Court of South Carolina denying Dale Yates' petition for a writ of habeas corpus on remand from this Court is reported as *Yates* v. *Aiken*, 290 S.C. 232, 349 S.E.2d 84 (1986), and is reproduced in the Joint Appendix [J.A.] at 30-39. The previous decision of this Court granting petitioner's petition for writ of certiorari, vacating the judgment of the South Carolina Supreme Court and remanding the case for reconsideration in light of *Francis* v. *Franklin*, 471 U.S. 307 (1985), is reported as *Yates* v. *Aiken*, 474 U.S. ___, 106 S.Ct. 218 (1985) and is reproduced at J.A. 29. The previous *per curiam* order of the South Carolina Supreme Court denying Yates' petition for habeas corpus is unreported, and is reproduced at J.A. 27. The original opinion of the South Carolina Supreme Court affirming petitioner's convictions and death sentence on direct appeal is reported as *State* v. *Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1122 (1983), and is reproduced at J.A. 10-26.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the South Carolina Supreme Court was entered on September 29, 1986. The petition for certiorari was filed on December 19, 1986, and was granted on March 30, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

This case further involves S.C. Code Ann. § 16-3-10 (1986 Cum. Supp.), which provides:

> "*Murder*" is the killing of any person with malice aforethought, either express or implied.

It further involves S.C. Const. art. V, § 5, which provides in pertinent part:

> The Supreme Court shall have power to issue writs or orders of . . . habeas corpus, and other original and remedial writs.

STATEMENT OF THE CASE

Ordered by this Court to reconsider the constitutionality of the malice instructions given at petitioner's trial in light of *Francis* v. *Franklin*, 471 U.S. 307 (1985), *Yates* v. *Aiken*, 474 U.S. ___, 106 S.Ct. 218 (1985); J.A. at 29, the South Carolina Supreme Court acknowledged the constitutional invalidity of the challenged instructions under *Francis*, but nevertheless declined to vacate petitioner's conviction on the grounds that the constitutional principles set forth in *Francis* were not to be applied retroactively to cases already final on direct appeal at the time that *Francis* was decided. *Yates* v. *Aiken*, 290 S.C. 232, 349 S.E.2d 84 (1986), J.A. 30-34. The question now before this Court is the correctness of the state court's retroactivity holding.

A. How The *Francis* v. *Franklin* Violation Occurred At Trial

The petitioner and an accomplice, Henry Davis, robbed a country store in Greenville County, South Carolina. During the robbery, petitioner shot and slightly wounded one of the proprietors, Willie Wood, and then ran out of the store carrying some stolen money. *Yates* v. *Aiken*, *supra*, 290 S.C. at 237, 349 S.E.2d at 87, J.A. at 35. At about that time, Mr. Wood's mother, Helen Wood, entered the store. While petitioner sat in the car outside, Davis, who remained inside the store, stabbed Mrs. Wood to death. Mr. Wood then seized a pistol and shot and killed petitioner's accomplice, Henry Davis. Petitioner was subsequently found guilty of Mrs. Wood's murder. *Id.*[1]

At trial, petitioner contended that he had abandoned the robbery prior to Mrs. Wood's arrival in the store, and that he had not intended that she be killed. Indeed, as the South Carolina Supreme Court recognized, petitioner had fled the store at about the time Mrs. Wood arrived, *State* v. *Yates*, *supra*, 280 S.C. at 33, 310, S.E.2d at 807-808, J.A. at 11, and petitioner insisted at trial that he had never seen Mrs. Wood at any time before, during or after the crime. Tr. 1103.[2] The South Carolina Supreme Court summarized petitioner's trial testimony as having been to the effect that "he did not kill Mrs. Wood and that it was his intent all along to abandon the robbery without hurting anybody if the victim refused to co-operate." 280 S.C. at 33, 310 S.E.2d at 808, J.A. at 11.

---

[1] He was also found guilty of conspiracy and armed robbery, and of assault and battery with intent to kill in connection with the shooting of Mr. Wood.

[2] References to the transcript of petitioner's trial are cited in this brief as "Tr."

An essential element of murder in South Carolina is that the killing was carried out with malice aforethought. S.C. Code Ann. § 16-3-10 (1976). In order to establish petitioner's criminal liability for the homicidal act of his accomplice Davis, the prosecution relied on the law of parties, under which each member of an unlawful conspiracy is criminally liable for all of the acts of his co-conspirators. *See State* v. *Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972).[3] This legal principle did not, however, relieve the state of the burden of establishing the element of petitioner's own malicious mental state beyond a reasonable doubt: petitioner's participation in a dangerous felony is not, under South Carolina law, a substitute for evidence of actual malice, but is merely a circumstance from which the jury is permitted to infer the existence of malice. *See State* v. *Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585 (1982).[4]

Since state law required the jury to determine whether the state had proven the element of malice beyond a reasonable doubt, the trial judge undertook to define express and implied malice for the jury. The malice instructions, in their entirety, were as follows:

> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought, and such proof must be beyond a rea-

[3] In accordance with state law, the trial judge charged the jury that when two or more parties combine together to commit a dangerous unlawful act which results in death, "the hand of one is the hand of all," and all participating in the unlawful act are equally guilty of the murder. J.A. at 8.

[4] The state did not rely on a felony-murder theory in its prosecution of petitioner. *State* v. *Yates*, *supra*, 280 S.C. at 34, 310 S.E.2d at 810, J.A. at 17.

> sonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words "express" and "implied" do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.
>
> Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.
>
> Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. *Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse.* In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. *I tell you, also, that malice is implied or presumed from the use of a deadly weapon.* I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a

> determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.
>
> There must be malice aforethought. While the law does not require that malice exists for any particular length of time before the commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the previous evil intent and the act which produces the evil result.

J.A. 6-7, Tr. 1207-1208 (emphasis added).

After hearing these instructions, the jury convicted petitioner of the murder of Mrs. Wood, as well as of conspiracy, robbery, and assault on Willie Wood. He was sentenced to death on the murder charge, and his convictions and death sentence were affirmed by the South Carolina Supreme Court. *State* v. *Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1162 (1983).

Petitioner did not object to the malice instructions at trial nor did he assign them as error on direct appeal. However, in affirming petitioner's conviction the South Carolina Supreme Court stated that while "[i]ssues not argued are normally not considered by this Court but in light of the penalty involved, we have considered all exceptions and the entire record to ascertain if there has been committed prejudicial error; we find none." *State* v. *Yates*, 280 S.C. at 45, 310 S.E.2d at 814, J.A. at 26.[5]

[5] The fact that petitioner did not object to the malice instructions at trial or on direct appeal creates no procedural bar under South Carolina law. The South Carolina Supreme Court has consistently refused to recognize procedural default in capital cases, *State* v. *Drayton*, 287 S.C. 226, 228, 337 S.E.2d 216, 217 (1985); *State* v. *Peterson*, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985); *State* v. *Butler*, 277 S.C. 543, 546, 290 S.E.2d 420, 421 (1982); *State* v. *Adams*, 277 S.C. 115, 119, 283 S.E.2d 582, 584 (1981), and has reversed capital convictions and death sentences on grounds not raised by the appellants at any stage of the trial or appellate process. *State* v. *Patterson*, 278 S.C. 319, 320-321, 295 S.E.2d 264 (1982); *State* v. *Gilbert*, 273 S.C. 690, 695-696, 258 S.E.2d 890, 894 (1979). In *Thompson* v. *Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), moreover, the South Carolina Supreme Court granted post-conviction relief on the basis of a claim of improper prosecution jury argument which had been raised for the first time on collateral attack after the death sentence had become final on direct appeal. In view of South Carolina's clear rejection of procedural default in capital cases, petitioner's challenge to the malice instructions at issue here is not procedurally barred as a matter of state law, and the South Carolina Supreme Court has never suggested otherwise.

B. How The *Francis* v. *Franklin* Issue Arose On Collateral Review

Ten months after its decision in petitioner's case, the South Carolina Supreme Court reversed a capital murder conviction on the basis of malice instructions virtually identical to those given at petitioner's trial. *State* v. *Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *see also State Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984). In both *Elmore* and *Woods*, the state supreme court acknowledged that the malice instructions had created burden-shifting mandatory presumptions.

Following *Elmore* and *Woods*, Yates filed a petition for writ of habeas corpus in the South Carolina Supreme Court seeking vacation of his conviction for murder. S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-310 (1976). In his petition, Yates asserted that the instructions which guided the jury at his trial created mandatory rebuttable presumptions of malice in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and cited *State* v. *Elmore*,

supra, and *State* v. *Woods*, *supra*.[6] In its return to the habeas petition, respondents denied that the challenged malice instructions violated due process, but consented to petitioner's request to consolidate his habeas corpus petition challenging the instructions with the post-conviction appeal then pending in the state supreme court. Return to Petition for Habeas Corpus, *Yates* v. *Aiken*, February 14, 1985.[7]

On April 29, 1985, while petitioner's habeas petition was pending before the South Carolina Supreme Court, this Court decided *Francis* v. *Franklin*, 471 U.S. 307 (1985). Two days later, petitioner submitted a supplemental memorandum asserting that *Francis* controlled his case and required that his murder conviction be vacated. On May 22, 1985, however, the South Carolina Supreme Court summarily denied habeas relief. J.A. at 27. Petitioner then sought a writ of certiorari here. This Court granted the writ, summarily vacated the judgment of the South Carolina Supreme Court, and remanded petitioner's case for further consideration in light of *Francis* v. *Franklin*. *Yates* v. *Aiken*, 474 U.S. ____, 106 S.Ct. 218 (1985); J.A. at 28-29.

C. How The Retroactivity Issue Arose On Remand

Within a few days of the South Carolina Supreme Court's receipt of the mandate of this Court ordering

[6] This habeas corpus petition was filed together with a petition for writ of certiorari seeking state supreme court review of the denial of petitioner's application for post-conviction relief. *See* J.A. 1. The issues raised in the post-conviction relief application and the state certiorari petition were unrelated to petitioner's *Sandstrom* claim.

[7] Respondent's return stated that "[t]o assure continuity of these proceedings and prevent unnecessary multiple litigation, Respondents have no objection to the consolidation motion to resolve the apparent issues." *Id.*, at 2.

reconsideration of petitioner's case in light of *Francis* v. *Franklin*, the state supreme court issued a brief *per curiam* order establishing for the first time the rule of nonretroactivity by which it ultimately disposed of petitioner's constitutional claim. *McClary* v. *State*, 287 S.C. 160, 337 S.E.2d 218 (1985). In *McClary*, a defendant had sought post-conviction relief in a state trial court on the grounds that his trial counsel had been ineffective for failing to object to instructions which were later held in *State* v. *Elmore*, *supra*, to create unconstitutional mandatory rebuttable presumptions of malice.[8] Following denial of his application, the prisoner sought review by way of a petition for writ of certiorari in the South Carolina Supreme Court. Rule 50(9) Rules of Practice of the South Carolina Supreme Court (Uniform Post-Conviction Procedure Act). The state supreme court normally does not issue opinions when it denies such petitions for discretionary review, and the retroactivity of *Elmore* and South Carolina's other recent decisions on burden-shifting jury instructions had not been briefed or otherwise raised by the parties in *McClary*. The South Carolina court nevertheless used the occasion of its denial review of McClary's ineffective-assistance claim to announce, "adopting the reasoning of *Shea* v. *Louisiana*, 470 U.S. [51] (1985) . . . *Elmore's* retroactive effect is limited to cases pending on direct appeal and will not apply to collateral attacks on criminal convictions." *McClary* v. *State*, *supra*, 287 S.C. at 161, 337 S.E.2d at 218.

[8] Because *McClary* was a non capital case, the defendant's failure to object to the malice instruction at trial presumably barred him from raising his *Sandstrom* claim either on appeal or in post-conviction proceedings. *State* v. *Stone*, 285 S.C. 396, 330 S.E.2d 286 (1985); *State* v. *Williams*, 266 S.C. 325, 223 S.E.2d 38 (1976).

In their brief filed in the South Carolina Supreme Court on remand in this case, respondents relied upon *McClary* to argue for the first time that *State* v. *Elmore's* prohibition of mandatory rebuttable presumptions of malice should not be accorded retroactive effect in collateral proceedings such as this one. Brief of Respondents, *Yates* v. *Aiken*, *supra*, at 11. Respondents also argued, as they had in their Brief in Opposition to the petition for writ of certiorari in this Court, that the challenged instructions did not in fact create unconstitutional mandatory rebuttable presumptions of malice. Finally, respondents asserted for the first time that the error, if any, was harmless. *Id.* at 19.

In its opinion on remand, the South Carolina Supreme Court summarily dismissed respondents' contention that the challenged instructions satisfied current constitutional standards by acknowledging that "[t]he jury instruction at Yates' trial suffered from the same infirmities present in *Elmore* and addressed in *Francis* v. *Franklin*." *Yates* v. *Aiken*, 290 S.C. 232, 234, 349 S.E.2d 84, 85 (1986); J.A. at 31. The South Carolina court nevertheless denied relief. The sole basis for this denial was the court's conclusion, first announced in its recent *McClary* decision, that its prior holding in *State* v. *Elmore*, which declared burden-shifting jury instructions to be unconstitutional, should not be applied to cases such as petitioner's which were already final on direct appeal when *Elmore* was decided. 290 S.C. at 236, 349 S.E.2d at 85-86, J.A. at 34. Despite the court's acknowledgement that the malice instructions shared the constitutional defects of those at issue in *Francis* v. *Franklin*, the majority opinion characterized the issue before it as the retroactivity, under state law, of a "prior state decision," *State* v. *Elmore*, and did not discuss the effect of the

federal constitutional character of petitioner's claim on the question of retroactivity. 290 S.C. at 234-236, 349 S.E.2d at 85-86, J.A. at 31-34. Justice Finney dissented, arguing that full retroactive application of *Francis* was compelled by United States Supreme Court precedent, and that *Francis*, *Sandstrom* and *Elmore* required that petitioner be granted a new trial. 290 S.C. at 238-240, 349 S.E.2d at 87-89, J.A. at 36-39.

SUMMARY OF ARGUMENT

In refusing to carry out this Court's order to reconsider its prior denial of habeas corpus relief in light of *Francis* v. *Franklin*, 471 U.S. 307 (1985), the South Carolina Supreme Court characterized the issue before it on remand as involving the retroactivity of a "state decision," *State* v. *Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). In fact, *Elmore* is nothing but South Carolina's recognition of the constitutional principles of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), a case decided two years before petitioner's trial, and neither the date nor the holding of *Elmore* has any bearing on South Carolina's obligation to apply *Sandstrom* to the facts of petitioner's case. Moreover, *Francis* v. *Franklin* established no new constitutional doctrine, but simply applied *Sandstrom* to an arguably different set of facts. Thus the issue of "retroactivity" identfied by the South Carolina Supreme Court is illusory.

Even if a genuine question of retroactivity were raised by *Francis* v. *Franklin*, this Court's precedents governing the retroactivity of new constitutional rules of criminal procedure in collateral proceedings make clear that full retroactive application is required. *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967); *Allen* v. *Hardy*, 478 U.S. ____, 106 S.Ct. 2878, 2080 (1986). Complete retroactive effect is

normally accorded to new constitutional rules whose major purpose "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Williams* v. *United States*, 401 U.S. 646, 653 (1971) (plurality opinion); *United States* v. *Johnson*, 457 U.S. 537, 544 (1982). The principle of *Francis* v. *Franklin* is unquestionably such a rule. As described by the Court in *Francis*, the prohibition against "evidentiary presumtions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime . . . protects the 'fundamental value determination of our society . . . that it is far worse to convict an innocent man than to let a guilty man go free.'" 471 U.S. at 313 (citations omitted). This makes clear that *Francis* is squarely among that category of constitutional decisions which are invariably accorded full retroactive effect. Moreover, the appropriateness of retroactive application is all the greater here because no state could justifiably have relied on any contrary legal rule prior to *Francis*, and because the impact of full retroactive application of *Francis* on the administration of justice will be minimal.

Finally, the fact that this case arises on state rather than federal collateral review is without significance for the issue presented here. The retroactivity of federal constitutional decisions is a question of federal law to be determined by this Court. No state may maintain a procedure for adjudicating collateral attacks on criminal convictions while at the same time refusing to apply controlling federal law.

ARGUMENT

SOUTH CAROLINA WAS NOT ENTITLED TO AVOID COMPLIANCE WITH THIS COURT'S PREVIOUS REMAND ORDER BY DECLARING THE CONSTITUTIONAL PRINCIPLES OF *FRANCIS* V. *FRANKLIN* TO BE NON-RETROACTIVE.

A. Contrary to the South Carolina Supreme Court's assertion below, the retroactivity of decisions prohibiting burden-shifting jury instructions in criminal cases is a question of federal law.

At the outset, petitioner wishes to clarify just what it is that the South Carolina Supreme Court has refused to apply in his case. The South Carolina court began its opinion on remand by acknowledging that the challenged jury instruction "suffered from the same infirmities . . . addressed in *Francis* v. *Franklin*, [471 U.S. 307 (1985)]." *Yates* v. *Aiken*, 290 S.C. 232, 234, 349 S.E. 2d 84, 85 (1986); J.A. at 31. However, the court then proceeded to frame the issue before it as involving the retroactivity of a "prior state decision," *State* v. *Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). On this basis, the court characterized the issue as one of state law only, and asserted that it had authority "to determine our own standards regarding retroactivity." *Yates* v. *Aiken*, *supra*, 290 S.C. at 234, 349 S.E.2d at 85, J.A. at 31-32.

What this preamble to the South Carolina Supreme Court's opinion overlooks is that *State* v. *Elmore* was simply South Carolina's application of the constitutional principles set forth in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), *County Court of Ulster County* v. *Allen*, 442 U.S. 140 (1979), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). In *Elmore*, the court sustained a federal constitutional challenge to malice instructions materially indistinguishable from those given in this case. The

appellant in *Elmore* had asserted that these instructions "created a mandatory presumption of malice which unconstitutionally relieved the prosecution of its burden to prove that element of the offense of murder beyond a reasonable doubt," and cited this Court's decisions in *Sandstrom* and *County Court of Ulster County* v. *Allen*, *supra*. Brief of Appellant at 24, *State* v. *Elmore*, *supra*. The South Carolina Supreme Court agreed with this contention and reversed without any substantial discussion of the issue beyond its acknowledgement that the instruction of the presumption of malice from the use of a deadly weapon "constituted a mandatory presumption rather than a permissive inference." *Id.*, 279 S.C. at 421, 308 S.E.2d at 784; *accord State* v. *Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984). Any possible doubt that *Elmore* represents anything other than the application of United States Supreme Court case law was removed, moreover, by the South Carolina Supreme Court's statement in its opinion on remand in this case that the jury instruction at petitioner's trial suffered from the same infirmity present in *Elmore* and addressed in *Franklin*. *Yates* v. *Aiken*, *supra*, 290 S.C. at 234, 349 S.E.2d at 85, J.A. at 31.

Accordingly, the *Elmore* case to which South Carolina has refused to accord retroactive effect in this case is a "state decision" only in the most formal sense. The principle of law which South Carolina has refused to apply in petitioner's case is nothing other than the constitutional prohibition against burden-shifting presumptions which this Court discussed and applied in *Sandstrom* v. *Montana* and *Francis* v. *Franklin*.[9]

[9] The legal relevance of *State* v. *Elmore*, is all the more doubtful when it is recalled that petitioner's case was before the South Carolina Supreme Court as a result of this Court's order to reconsider the state court's previous denial of habeas corpus relief "in light of *Francis* v. *Franklin*." *Yates* v. *Aiken*, 474 U.S. ____, 106 S.Ct. 218 (1985). Whatever the effect of previous South Carolina decisions such as *Elmore* might have been, the South Carolina Supreme Court's obligation to comply with the terms of this Court's order on remand is clear. U.S. Const. art. VI. To be sure, South Carolina's failure to abide by this Court's remand order is not completely without historical precedent. *Henry* v. *City of Rock Hill*, 241 S.C. 427, 128 S.E.2d 775 (1962), *vacated and remanded*, 375 U.S. 6 (1963), *affirmed on remand*, 244 S.C. 74, 135 S.E.2d 718 (1963), *rev'd*, 376 U.S. 776 (1964) (per curiam). But the state court's opinion in this case is noteworthy for its failure to offer any explanation whatever for its lack of compliance with the explicit mandate of this Court.

Under these circumstances, the South Carolina Supreme Court's reasoning is not easy to understand. Despite its express recognition of the federal constitutional character of the legal error involved in both *Elmore* and in this case, the majority opinion treated the error as merely one of state law. The South Carolina majority then castigated this Court's decisions regarding retroactive application of new rules of criminal law as "a mass of confusion," announced that its task in petitioner's case was to apply those decisions "at the state level to determine the retroactive effect of a prior state decision," and asserted that the one "controlling" factor in this Court's retroactivity decisions is that "'[r]etroactive application is not compelled, constitutionally or otherwise.'" *Yates* v. *Aiken*, 290 S.C. at 234, 349 S.E.2d at 85. J.A. at 31 (*quoting Solem* v. *Stumes*, 465 U.S. 638, 642 (1984)). The state supreme court majority concluded from this that it was free to determine its own standard regarding retroactivity of state decisions, and that United States Supreme Court decisions concerning retroactivity were not binding upon it. *Id.*

If these statements were meant to suggest that the application of *Sandstrom's* prohibition of burden-shifting

jury instructions was purely a matter of state law, then the South Carolina court's error is self-evident. *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987); *Brown* v. *Louisiana*, 447 U.S. 323 (1980); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). But since the majority opinion had begun by acknowledging that the jury instructions in *Elmore*, *Francis* v. *Franklin* and this case all involve "the same infirmities," the court could not have supposed that the underlying constitutional claim in this case was controlled by state law alone. Rather, the majority opinion appears to have misread the Court's general remarks in *Solem* v. *Stumes* as indicating that the states are free to ignore the entire body of this Court's decisions concerning retroactive application of federal constitutional decisions.

This view is, again, self-evidently wrong. While this Court has repeatedly recognized that retroactive application of constitutional decisions in the criminal law is not in and of itself required by due process, *Linkletter* v. *Walker*, *supra*, 381 U.S. at 628-629 (1965); *Solem* v. *Stumes*, *supra*, this has meant only that the retroactive application of such decisions to criminal convictions already final on direct appeal must be determined on a case-by-case basis, with due regard for the nature of the right implicated by each decision. *United States* v. *Johnson*, 457 U.S. 537 (1982). Once this Court has determined whether and to what extent a rule of constitutional law is to be applied retroactively, that determination is binding on the states. *Solem* v. *Stumes*, *supra*; *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Linkletter* v. *Walker*, *supra*. And when those retroactivity precedents are applied here, it becomes clear that this case presents no retroactivity issue, and that even if it did, full retroactivity would be required.

B. Because Neither *Francis* v. *Franklin* Nor *State* v. *Elmore* Announced Any "New" Principle Of Law, Neither Case Presents Any Issue Of Retroactive Application.

As pointed out above, the constitutional basis of petitioner's challenge to the instructions given at his 1981 murder trial is this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), a case decided two years before petitioner's trial. The fact that four years elapsed between *Sandstrom* and the South Carolina Supreme Court's recognition in *State* v. *Elmore* of the invalidity, under *Sandsrom*, of the malice instruction given here does not entitle South Carolina to postpone *Sandstrom's* effective date to that of *Elmore*. The simple fact is that the instructions given at petitioner's trial were constitutionally invalid under *Sandstrom* at the moment they were read to the jury, and the South Carolina Supreme Court majority's suggestion that petitioner's present claim could not have been made and accepted prior to *Elmore* and *Francis* is patently without merit.[10]

Nor can South Carolina's suggestion that *Francis* v. *Franklin* represents some sort of "new" constitutional

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[10] The state court's attempt to defer the effective date of the federal constitutional principles of *Sandstrom* until the filing of its own opinion in *State* v. *Elmore* is even more inexplicable in view of the fact that the South Carolina Supreme Court had cautioned against the use of mandatory rebuttable presumptions of malice in a series of cases decided prior to *Elmore*. *See*, *e.g.*, *State* v. *Mattison*, 276 S.C. 235, 277 S.E.2d 598 (1981); *State* v. *Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979) (rejecting *Mullaney* attack on basis of determination that challenged instructions created permissive inference of malice rather than mandatory presumption). Moreover, the same court has expressly acknowledged that *Elmore's* prohibition of instructions creating burden-shifting presumptions of malice flows from the principles of *Sandstrom* as well as of *Francis*. *State* v. *Patrick*, 289 S.C. 301, 303, 345 S.E.2d 481, 482 (1986).

decision bear scrutiny in light of the *Francis* opinion itself. As the *Francis* Court stated,

> [t]he question before the Court in this case is almost identical to that before the Court in *Sandstrom:* 'whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of . . . state of mind,' 442 U.S. at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense.

471 U.S. at 313. Later in its opinion, the Court rejected as "simply inaccurate" the suggestion of a dissenting Justice that *Francis* had extended the holding of *Sandstrom*. *Sandstrom*, the Court observed, rested upon equally valid alternative rationales, one of which was that a mandatory rebuttable presumption of intent violated due process. *Id.* at 317-318, n.5.[11] Indeed, the unconstitutionality of mandatory rebuttable presumptions had been "definitively established" even before *Sandstrom* by *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *Patterson* v. *New York*, 432 U.S. 197 (1977). *Id.*[12]

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[11] Justice Powell dissented from the majority's conclusion that the challenged instruction actually violated *Sandstrom's* prohibition against burden-shifting rebuttable presumptions, but agreed with the Court that the governing legal principles were those set forth in *Sandstrom*. *Id.* at 327.

[12] That *Francis* established no new constitutional law has also been recognized both implicitly and explicitly by those courts which have had to consider whether the advent of *Sandstrom* and *Francis* could constitute "cause" to excuse defendants' failure to raise timely challenges to burden-shifting instructions given at pre-*Francis* trials. Typical of these is *Johnson* v. *Blackburn*, 778 F.2d 1044 (5th Cir. 1985), in which the court rejected a claim that the unconstitutionality of burden-shifting instructions on intent were sufficiently unforeseeable at the time of the defendant's trial shortly before *Sandstrom* as to justify his failure to object. *Compare Reed* v. *Ross*, 468 U.S. 1 (1984) (novelty of constitutional claim excused failure to object to burden-shifting instruction given at trial held prior to *In re Winship*, 397 U.S. 358 (1979)). In *Johnson*, the Fifth Circuit pointed out that *Sandstrom* was "an entirely foreseeable extension" of *In re Winship*, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *Patterson* v. *New York*, 432 U.S. 197 (1977). 778 F.2d at 1047. *Accord Cook* v. *Foltz*, 814 F.2d 1109 (6th Cir. 1987); *Tucker* v. *Kemp*, 256 Ga. 571, 351 S.E.2d 196 (1987) (petitioner should have challenged instruction identical to that involved in *Francis* in his 1980 state habeas petition; *Francis* did not change applicable law and thus did not justify successive petition); *see generally Engle* v. *Isaac*, 456 U.S. 107 (1982).

In this case, therefore, "the answer to the retroactivity question [must be] determined . . . through application of a threshold test." *United States* v. *Johnson*, 457 U.S. 537, 548 (1982). The pertinent portion of this threshold inquiry, as described in *Johnson*, is as follows:

> [W]hen a decision of this Court merely has applied settled precedents to new and different fact situations, no real question has arisen as to whether the new decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that decision in any material way.

Id., at 549 (citations omitted).

The need for this "threshold test" is self-evident. If every constitutional decision applying settled legal precedents to new facts were deemed to give rise to a "retroactivity" question, no decision would ever have any precedential effect, since each decision would establish on the date of its announcement a new starting date for the constitutional right involved. For this reason, the Court has invariably insisted upon "automatic" retroactive application of any decision which "did nothing more than

apply settled precedent to different factual situations." *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708, 714 (1987); *see also Truesdale* v. *Aiken*, 480 U.S. ___, 107 S.Ct. 1394 (1987) (per curiam); *Lee* v. *Missouri*, 439 U.S. 461 (1979) (per curiam).

In refusing on retroactivity grounds to apply *Francis* v. *Franklin* and *State* v. *Elmore* to review the constitutionality of the malice instructions given at petitioner's trial, the South Carolina Supreme Court described itself as adopting the view expressed by Justice Harlan in his influential dissent in *Desist* v. *United States*, *supra*. *Yates* v. *Aiken*, 290 S.C. at 235-236, 349 S.E.2d at 86. J.A. at 33. According to the state supreme court, Justice Harlan's *Desist* dissent supported its refusal to apply *State* v. *Elmore* and *Francis* v. *Franklin* retroactively in collateral proceedings because these rulings established neither that the trial court's action was void *ab initio* nor that the defendant's conduct was not subject to criminal punishment. 290 S.C. at 236, 349 S.E.2d at 86, J.A. at 32.

Even had this view of the scope of retroactivity in habeas cases won the acceptance of a majority of this Court, which it has not, *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708, 717 (1987) (Rehnquist, C.J., dissenting), the South Carolina court plainly overlooked the first step in Justice Harlan's retroactivity analysis, which is to determine whether the decision at issue actually created any genuinely "new" constitutional rule. The very opinion of Justice Harlan cited by the state supreme court made this point with unmistakable clarity:

> First, it is necessary to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law. . . . In such a context it appears very difficult to argue against the application of the "new" rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.

Desist v. *United States*, 394 U.S. 244, 263-244, 263-264 (1969) (Harlan, J. dissenting).[13] Because the South Carolina Supreme Court failed to recognize that *Francis* v. *Franklin* and *State* v. *Elmore* made no new law and thus

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[13] Dissenting from the Court's summary reversal of another South Carolina retroactivity decision, *Truesdale* v. *Aiken*, 480 U.S. ___, 107 S.Ct. 1394 (1987), Justice Powell recently observed that "[a]t least in the context of habeas petitions, we have not addressed the standards by which a court should determine the retroactive effect of cases . . . that arguably follow from existing precedents." 107 S.Ct. at 1395 (Powell, J. dissenting). This statement appears to reflect Justice Powell's view, consistently advanced since *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), that the Court should abandon its long-standing method of determining the retroactivity of new constitutional rules in habeas proceedings, *Stovall* v. *Denno*, 388 U.S. 293 (1967), and should adopt in its place the position advanced in Justice Harlan's dissenting opinion in *Desist* v. *United States*, *supra*, and his concurring opinion in *Mackey* v. *United States*, 401 U.S. 667, 675-698 (1971). That position, as summarized by Justice Powell, is that "cases on collateral review [should] ordinarily be considered in light of the rule as it stood when the conviction became final." *Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 248 (Powell, J. concurring); *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708, 716-718 (1987) (Powell, J., concurring). Whatever the merits of such an abrupt change in the Court's long-established retroactivity doctrine, they are not involved in this case. For as the excerpt quoted above from Justice Harlan's *Desist* opinion makes clear, the retroactivity issue detected here by the South Carolina Supreme Court is entirely illusory. Accordingly, petitioner respectfully submits that this case provides no occasion for the Court to reconsider how genuine questions of retroactivity should be resolved when they arise in collateral attacks on final convictions.

created no issue concerning retroactive application, the court erred in concluding that petitioner could be denied the benefit of the constitutional principles of both cases.[14]

C. Even If *Francis* v. *Franklin* Had Announced New Constitutional Doctrine, Full Retroactive Application Would Be Required Because *Francis* Is Primarily Designed To Safeguard The Truth-Seeking Function Of Criminal Trials.

Petitioner has pointed out above that this case presents no genuine question of retroactivity, since neither *State* v. *Elmore* nor *Francis* v. *Franklin* did any more than apply *Sandstrom* v. *Montana* to a particular set of jury instructions. But even had *Francis* v. *Franklin* been the first in the *Mullaney/Sandstrom* line of cases, rather than the most recent, this Court's retroactivity decisions leave no doubt that full retroactive application would be required.

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[14] Petitioner is not aware of even a single state or federal circuit court case from any jurisdiction other than South Carolina which so much as discusses whether *Francis* v. *Franklin* presents any substantial question of retroactivity. Cases discussing the effect of *Francis* in federal habeas corpus proceedings without any express consideration of retroactivity include *Matarese* v. *LeFevre*, 801 F.2d 98, 107 (2d Cir. 1986), *cert. denied*, 480 U.S. ____, 107 S.Ct. 1353 (1987); *Hyman* v. *Aiken*, 777 F.2d 938 (4th Cir. 1985), *vacated on other grounds*, 478 U.S. ____, 106 S.Ct. 3327 (1986); *Flowers* v. *Blackburn*, 779 F.2d 1115 (5th Cir.), *cert. denied*, 476 U.S. ____, 106 S.Ct. 1661 (1986); *Williford* v. *Young*, 779 F.2d 405 (7th Cir. 1985); *Wiley* v. *Rayl*, 767 F.2d 679 (10th Cir. 1985) (reserving question of retroactivity of *Sandstrom*); *Dobbs* v. *Kemp*, 790 F.2d 1499, 1507-1509 (11th Cir. 1986), *cert. denied*, 480 U.S. ____, (No. 86-6933) (May 18, 1987). Additionally in *Rose* v. *Clark*, 478 U.S. ____, 106 S.Ct. 3101 (1986), this Court considered without any discussion of retroactivity the legal effect of a *Francis* v. *Franklin* violation on a state conviction which had become final after *Sandstrom* but before *Francis*.

In the first modern decision concerning the retroactivity of "new" constitutional rules of criminal procedure, *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Court held that retroactivity determinations should be made on the basis of "the prior history" of the constitutional rule involved, "its purpose and effect, and whether retrospective application will further or retard its operation." 381 U.S. at 629. The Court later summarized these criteria as involving:

> (a) the purpose to be served by the new standards;
>
> (b) the extent of the reliance by law enforcement authorities on the old standards; and
>
> (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. *Denno*, 388 U.S. 293, 297 (1967). Although the *Stovall* factors no longer limit the retroactive application of new constitutional rules to cases not yet final on direct appeal when the new rule was announced, *Griffith* v. *Kentucky*, 479 U.S. ____, 107 S.Ct. 708 (1987), this Court has consistently looked to the *Stovall* factors to determine whether retroactive application should extend to cases arising on collateral attack on convictions which had become final prior to the date of the decision announcing the new rule. *See, e.g. Allen* v. *Hardy*, 478 U.S. ____, 106 S.Ct. 2878, 2080 (1986); *Solem* v. *Stumes*, 465 U.S. 638, 643 (1984); *Gosa* v. *Mayden*, 413 U.S. 665, 679 (1973); *Williams* v. *United States*, 401 U.S. 646, 652 n.5 (1971) (plurality opinion); *Witherspoon* v. *Illinois*, 391 U.S. 510, 523 n.22 (1968); *Roberts* v. *Russell*, 392 U.S. 293, 294 (1968); *DeStefano* v. *Woods*, 392 U.S. 631, 633 (1968). For the reasons that follow, the Court's *Stovall* analysis plainly requires that *Francis* v. *Franklin* be given complete retroactive effect.

"Foremost among [the *Stovall*] factors is the purpose to be served by the new constitutional rule." *Desist* v. *United States*, 394 U.S. 244, 249 (1969). Thus "[a]t one extreme" of its spectrum of retroactivity decisions, "the Court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" *United States* v. *Johnson*, 457 U.S. 537, 544 (1982) (*quoting Williams* v. *United States*, 401 U.S. 646, 653 (1971) (plurality opinion)); *see also*, *Solem* v. *Stumes*, *supra*, 465 U.S. at 643-644; *Allen* v. *Hardy*, 478 U.S. ____, 106 S.Ct. 2878, 2880 (1986). As the Court explained in *Williams* v. *United States*, *supra*, new constitutional doctrine designed to overcome defects in the truth-seeking process in criminal trials is invariably given complete retroactive effect, and "[n]either good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." 401 U.S. at 653.

There can be no doubt that *Francis* v. *Franklin's* prohibition against burden-shifting presumptions is among the rules which must, under *Stovall* v. *Denno* and *United States* v. *Johnson*, be given full retroactive effect. The principle of *Francis* v. *Franklin* which "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime . . . protects the 'fundamental value determination of our society . . . that it is far worse to convict an innocent man than to let a guilty man go free.'" 471 U.S. at 313 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). This Court has already held that *In re Winship* and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the first two decisions expounding what *Francis* v. *Franklin* described as this "bedrock, 'axiomatic and elementary'" constitutional principle, 471 U.S. at 313, are to be given retroactive effect. *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972) (applying *Winship* retroactively), *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977) (apply *Mullaney* retroactively). Since *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) and *Francis* v. *Franklin* simply applied *Winship* and *Mullaney* to the question of burden-shifting jury instructions, it is plain that these cases, like *Winship* and *Mulaney*, belong to that class of constitutional decisions which lie at the "extreme" of full retroactivity to which the Court referred in *United States* v. *Johnson*.

In sum, this Court's long-established framework for analyzing the question of retroactivity of "new" constitutional rules of criminal procedure on collateral review would plainly require South Carolina to afford petitioner the benefit of the constitutional principles enunciated in *Francis* v. *Franklin* even had *Francis* declared these principles for the first time. Under such circumstances, neither the second or third *Stovall* factors—good faith reliance by state or federal authorities on prior constitutional law or accepted practice, and severe impact on the administration of justice—could suffice to limit retroactive application. *Williams* v. *United States*, *supra*, 401 U.S. at 653.

But the results would remain the same even if the remaining *Stovall* factors were weighed in the balance. Since *Francis* merely applied the constitutional principles of *Sandstrom* to the particular facts involved in that case, no state court after *Sandstrom* could justifiably

have relied on any precedent inconsistent with the principles applied in *Francis*. This point is amply demonstrated by the fact that the South Carolina Supreme Court itself anticipated and applied the constitutional principles of *Francis* well before *Francis* was decided. *See State* v. *Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Furthermore, because the unconstitutionality of burden-shifting jury instructions in criminal cases was clearly established before *Francis*, the impact on the administration of justice which will result from applying *Francis* retroactively in state and federal habeas corpus proceedings would appear to be minimal.[15] Thus, even if the second and third *Stovall* factors could ever suffice to limit the retroactive application of a constitutional principal designed to safeguard the accuracy of the fact-finding process in criminal cases, every relevant consideration weighs on the side of full retroactive application.

D. The Fact That This Case Arises On State Rather Than Federal Post-Conviction Review Does Not Affect Its Resolution.

Before concluding, petitioner would note a question raised by Justice Powell in his recent dissent in *Truesdale* v. *Aiken*, 480 U.S. ___, 107 S.Ct. 1394 (1987) concerning whether the same retroactivity rules should govern state and federal post-conviction proceedings. This question

[15] This case may, therefore, be contrasted with *Allen* v. *Hardy*, 478 U.S. ___, 106 S.Ct. 2878, 2881 (1986), in which the Court addressed the retroactivity, on collateral review, of *Batson* v. *Kentucky*, 476 U.S. ___, 106 S.Ct. 1712 (1986). In *Allen*, the Court acknowledged that *Batson* marked a clear break with *Swain* v. *Alabama*, 380 U.S. 202 (1965), upon which state and federal prosecutors, trial judges and appellate courts had justifiably relied for more than two decades. Given this reasonable reliance upon *Swain*, it was plain that retroactive application of *Batson* on collateral review of final convictions would seriously disrupt the administration of criminal justice.

appears to have been implicitly answered in the affirmative by the Court's summary action in *Truesdale*.[16] The reasons for this are clear. While the states are not constitutionally required to provide any form of post-conviction remedy, *Pennsylvania* v. *Finley*, ___ U.S. ___, 55 U.S.L.W. 4612, 4614, (May 18, 1987), it is plain that no state may maintain a post-conviction forum—or any other legal procedure, for that matter—in which litigants are prohibited from seeking to vindicate valid federal legal and constitutional claims. *McKnett* v. *St. Louis & S.F. Ry. Co.*, 292 U.S. 230 (1934); *Testa* v. *Katt*, 330 U.S. 386 (1947); 16 Wright & Miller, *Federal Practice and Procedure* § 4024 (1977). On the contrary, "state courts, like federal courts, have an obligation to . . . uphold federal law." *Stone* v. *Powell*, 428 U.S. 465, 494 n.35 (1976) (citing *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816)).[17] Since the retroactivity of federal constitutional

[16] *Truesdale* involved a death-sentenced prisoner's effort to raise a claim under *Skipper* v. *South Carolina*, 476 U.S. ___, 106 S.Ct. 1669 (1986) by means of an application for post-conviction relief in the South Carolina state courts. The South Carolina Supreme Court ruled, in a decision rather similar to the one which the same court issued less than three months later in this case, that *Skipper*'s retroactive effect would be limited to cases pending on direct appeal, and that *Skipper* would not apply to death sentences which had become final before *Skipper* was decided. *Truesdale* v. *Aiken*, 289 S.C. 488, 347 S.E.2d 101 (1986). This Court granted certiorari and summarily reversed, citing *Skipper*, *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *United States* v. *Johnson*, 457 U.S. 537, 549 (1982).

[17] That South Carolina is free to dispense with all forms of post-conviction remedy has no more bearing on its obligation to apply federal law in its courts than does the state's undoubted freedom to dispense with the right of direct appeal. *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). For if the mere fact that states are not constitutionally required to entertain collateral attacks on criminal convictions authorized state judges to ignore federal law when they do decide such cases, it would be hard to see any reason why state courts should be bound by federal law in deciding cases on direct appeal.

criminal law decisions is unquestionably a matter of federal law, *Brown* v. *Louisiana*, 447 U.S. 323 (1980), South Carolina is simply not at liberty to create and maintain a habeas corpus remedy, as it has done through S.C. Const. art. V § 5 and S.C. Code § 14-3-310 (1976), and yet refuse to accord to habeas petitoners the benefit of the law of retroactivity of federal constitutional decisions as expounded by this Court. Because the South Carolina Supreme Court attempted to do just that in this case, its judgment should be reversed.

CONCLUSION

For the foregoing reasons, the Petitioner submits that the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 86-6060

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DALE ROBERT YATES,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF FOR RESPONDENTS

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ATTORNEYS FOR
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QUESTION PRESENTED

Did the South Carolina Supreme Court avoid compliance with this Court's order of remand for further consideration in light of Francis v. Franklin when it held that its previous ruling in State v. Elmore is not to be applied retroactively to state collateral attacks of criminal convictions?

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STATEMENT OF THE CASE

After consideration of a petition for a writ of certiorari involving the summary denial of a state habeas corpus petition, this Court vacated the decisions of the South Carolina Supreme Court and

remanded the matter to the state court for further consideration in light of Francis v. Franklin, 471 U.S. 307 (1985). JOINT APPENDIX [J.A.] at 29. The South Carolina Supreme Court on remand stated that the jury instruction at Yates' 1981 trial that malice is presumed from the use of a deadly weapon suffered from the same infirmities present in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) [in which error was found in a similar charge] and addressed in Francis v. Franklin, supra. Yates v. Aiken, 290 S.C. 232, 234, 349 S.E.2d 84, 85 (1986). J.A. 30-34. The South Carolina Supreme Court considered the question before it as whether Elmore (not Francis v. Franklin) may be applied retroactively to

invalidate a conviction which was final at the time Elmore was decided. Reviewing prior decisions of this Court to determine the retroactive effect of a prior state decision, the South Carolina Supreme Court adhered to an earlier decision in McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985), that the retroactive application of Elmore is limited to cases pending on direct appeal at the time Elmore was decided. 290 S.C. at 236, 349 S.E.2d at 85-86, J.A. at 34. The court affirmed the conviction and denied the petition for a writ of habeas corpus. The question before this Court is the correctness of the state court's action.

A. The 1981 Trial and Direct Appeal.

During the petitioner's 1981 murder trial, the overwhelming evidence reveals that the petitioner entered into and fully participated in a criminal plan that led to the death of a victim of his criminal design and the death of one of the confederates. On February 12, 1981, David Loftis, Henry Davis and the petitioner, Dale Yates, talked about various places to rob. Tr. p. 813, ll. 21-24, p. 815, ll. 5-12. Petitioner mentioned that his brother had a gun, suggested that his brother would be more likely to lend the gun to Loftis than himself, and rode with Loftis and Davis to borrow the pistol. Tr. p. 816, l. 23 - p. 819, l. 10. Loftis, Davis and the petitioner

spent the night of February 12 in the same apartment and the following morning, February 13, 1981, rode around in the same car casing places (stores) for an armed robbery. During this time, Loftis told Davis and the petitioner that the electric chair was a possibility if someone were killed during the armed robbery. Tr. p. 820, l. 20 - p. 825, l. 14. At approximately 3:00 P.M., the petitioner and Davis left Loftis at a mall and drove away with the pistol under the passenger side of the front seat. Tr. pp. 828-829, l. 6.

The petitioner and Davis subsequently entered Wood's store, by his own testimony, for the purpose of committing an armed

robbery. Tr. p. 1084, l. 23 - p. 1085, l. 6; p. 1086, l. 24 - p. 1087, l. 14; p. 1092, ll. 16-25. The petitioner approached Willie Wood and at gunpoint demanded money; Davis made the same demand with the threat of a knife wielded in a stabbing motion. Wood gave Davis approximately $3,000, and Davis handed the money to Yates. Tr. p. 1095, ll. 13-22. Davis directed Wood to bend over the store counter but Wood refused to do so after looking at Davis' stabbing motions with the knife. Tr. pp. 914-915, l. 19; p. 922, l. 17 - p. 923, l. 3; p. 930, ll. 16-25. By his own testimony, Yates, at Davis' direction, shot at Wood two (2) times, as he stood approximately two (2) steps or six

(6) to ten (10) feet from the door of the store, and left the store after determining both that Wood was unarmed and a previously unseen female was present. Tr. p. 1097-1098, l. 6; p. 1093, ll. 1-7. Yates testified that he heard a female voice say "what's going on out there?," and then he said "let's go" and turned and went out the door. Tr. pp. 1098, 1103. He further testified that he entered the passenger side of the getaway car with both the gun and money, waited for Davis, and moved over to the steering wheel and drove away only when he thought that Davis had been caught. Tr. p. 1098, l. 7 - p. 1099, l. 3.

Meanwhile, after being shot by Yates, Wood saw Davis coming around

the counter toward him with the knife. Wood attempted to go to the front of the counter, but Davis reached Wood's back and his (Wood's) mother (approximately sixty-eight (68) years old) attempted to help him by grabbing Davis. Tr. p. 916, l. 17 - p. 917, l. 2; p. 922, l. 17 - p. 923, l. 3. When his mother fell to her hands and knees, Wood had been able to get his pistol from underneath his coat (Tr. p. 916, ll. 3-12) and shot, backing Davis away from him, until Davis dropped the knife and fell to the floor dead. Tr. p. 927 - p. 928, l. 6; p. 918, l. 21. Wood watched his mother die on the floor from a knife wound which had penetrated her heart and the full thickness of her chest. Tr. p.

917, l. 19 - p. 918, l. 21; p. 954, l. 16 - p. 955, l. 23.

During the trial, the trial court, without objection, instructed the jury on murder and the element of malice, in its pertinent part as follows:

> In order to convict one of murder, the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought, and such proof must be beyond a reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The

words 'express' and 'implied' do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.

Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a

wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before the commission of

> an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be the combination of the previous evil intent and the act which produces the fatal result.

J.A. 6-7. Tr. pp. 1207-1208. (emphasis added). The trial court also gave the jury instructions which concerned vicarious liability from an unlawful purpose (Tr. pp. 1209-1210), that a defendant is not responsible for a homicide committed by a co-defendant as an independent act growing out of private malice or ill-will which the slayer had toward the deceased (Tr. p. 1210), and withdrawal and abandonment. Tr. p. 1211. J.A. 7-9.

After the conclusion of the charges, trial counsel and the court had the following dialogue concerning the instruction on withdrawal:

> THE COURT: Mr. Mauldin, well, I, at no time ever intimated that you had the burden of proof. I don't think I did.
>
> MR. MAULDIN: That is correct. I don't recall any inference or statement that we did have the burden, it was simply a recitation of the fact that we might present that (withdrawal) as a defense ... .

Tr. p. 1217. The jury convicted the petitioner of murder, conspiracy, armed robbery and assault and battery with intent to kill. He was sentenced to death on the murder charge. This matter was affirmed by the Supreme Court of

EDITOR'S NOTE

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South Carolina on appeal and certiorari was denied by this Court. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1124 (1983). The issue presently before this Court was not raised on the appeal or in the post conviction relief proceedings.

Petitioner did not object to the malice instructions at trial nor did he assign them as error on his direct appeal. In affirming the conviction, the South Carolina Supreme Court stated that while "[i]ssues not argued are normally not considered by this Court but in light of the penalty involved, we have considered all exceptions and the entire record to ascertain if there has been committed

prejudicial error; we find none." State v. Yates, 280 S.C. at 45, 310 S.E.2d at 814, J.A. at 26.

B. The 1985 Writ of Habeas Corpus Proceedings.

While his appeal from the denial of a state application for post conviction relief was pending before the South Carolina Supreme Court, Yates filed a petition for a writ of habeas corpus in that court seeking vacation of his conviction. In his petition, Yates contended that the instruction was materially identical to an instruction which required reversal in State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984), in which the charge in State v. Elmore, supra, was held to be retroactive. He contended that since each decision was decided after his post conviction denial

and direct appeal, respectively, "petitioner has not been afforded an opportunity to request that the principles enunciated in Elmore and Woods be applied to his case" and that the court should hear the matter in its original jurisdiction. Petition for Habeas Corpus, Yates v. Aiken, January 14, 1985. In its return, the respondents asserted that the court's reasoning in its prior decisions of State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985), State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), and State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), required it to preserve the conviction and sentence.

On April 29, 1985, this Court decided Francis v. Franklin, 471 U.S. 307 (1985). On May 1, 1985, the petitioner submitted a supplemental memorandum asserting that Francis was dispositive of the federal constitutional issue presented by the petition. On May 22, 1985, the South Carolina Supreme Court summarily denied habeas corpus relief. J.A. at 27. Yates sought a writ of certiorari on the issue of the jury instructions on malice. On October 15, 1985, this Court granted the writ, summarily vacated the judgment of the South Carolina Supreme Court, and remanded the matter to the state court for further consideration in light of Francis v. Franklin. Yates v. Aiken, 474 U.S. __, 106

S.Ct. 218 (1985); J.A. at 28-29.

C. The Remand before the South Carolina Supreme Court.

On November 14, 1985, the mandate of this Court was sent. While the matter was pending on November 19, 1985, the South Carolina Supreme Court issued an order in McClary v. State, 287 S.C. 160, 337 S.E.2d 218 (1985), a state post conviction relief appeal that stated:

> We take this opportunity to clarify our holding in State v. Woods, 282 S.C. 18, 316 S.E.2d 673 ((1984). In Woods, we held that our decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), would be applied retroactively. Adopting the reasoning of Shea v. Louisiana, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985), we now hold that Elmore's retroactive effect will be limited to cases

> pending on direct appeal and will not apply to collateral attacks on criminal convictions.

The petitioner then sought a schedule for briefing and oral argument. In his brief, the petitioner contended that the remand by this Court strongly suggests that this Court be in agreement with his position because certiorari was granted in a case arising from a state post conviction proceeding as opposed to a federal proceeding which rarely occurs and because of the remand for reconsideration in light of Francis when he asserted that it was clear that the state court had already considered Francis prior to its denial. Brief of Appellant, Yates v. Aiken, pp. 6-9. The

petitioner further contended that the jury charges on malice violated the mandates of Francis and that harmless error was not applicable to these facts because he acknowledged being a participant in the robbery, but was not the actual slayer. The respondents argued that the issue on the malice charge was waived because of the failure of the petitioner to object to the charge or raise it in a timely manner on appeal and that McClary, supra, established an additional state procedural bar to raising the issue of burden-shifting charges in a collateral attack. Respondents further asserted that the charge created constitutionally permissive inferences and that the charges if error were harmless beyond a

reasonable doubt on the basis of the overwhelming facts in the record that established his guilt. Brief of Respondent, Yates v. Aiken, pp. 7-21.

In its opinion on remand, the South Carolina Supreme Court failed to address the petitioner's contention but acknowledged that "[t]he jury instructions at Yates' trial suffered from the same infirmities present in Elmore and addressed in Francis v. Franklin." Yates v. Aiken, 290 S.C. 232, 234, 349 S.E.2d 84, 85 (1986); J.A. at 31. The South Carolina Supreme Court held that its prior holding in State v. Elmore should not be applied to cases, such as Yates', which were already final on direct appeal when Elmore was decided.

The state court characterized the issue before it as the retroactivity, under state law, of a "prior state decision." J.A. 31-34.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court did not refuse to carry out the mandate of this Court, but rather established the scope of proceedings brought in its original jurisdiction in habeas corpus resting on the pleading before it. Further, the state court defined the scope of retroactivity of its own decisions and did not address the retroactivity of Francis v. Franklin. Since Francis established a new constitutional doctrine, retroactive application to collateral proceedings was not

required since it did not announce a rule of criminal procedure required to ensure fundamental fairness or hold a defendant's conduct entirely immune from criminal punishment.

Francis v. Franklin further is not entitled to complete retroactive application because its major purpose was not to overcome an aspect of the criminal trial that substantially impairs its truth finding function. Moreover, the factors concerning the reliance on the old rule and the effect of retroactive application on the administration of justice weigh heavily in favor of nonretroactive effect.

While the state court has not reviewed the merits of the jury

instructions under Francis, we submit that the charges were constitutionally adequate because a reasonable juror would not have understood the charge as creating an unconstitutional presumption. Further, since tne petitioner was charged under the law of the parties and acknowledged his participation in the crimes but not as the actual killer, it must be concluded that the charge on malice, if error, was harmless beyond a reasonable doubt.

ARGUMENT

A. The South Carolina Supreme Court has the authority to establish the scope of its own habeas proceedings and to define the effect of its own prior decisions. In collateral cases, retroactive application is only required when the decision announces a rule of criminal procedure to ensure fundamental fairness or

> holds a defendant's conduct entirely immune from criminal sanctions.

At the outset, respondent wishes to clarify what is before this Court. The petitioner draws the attention away from what he was seeking in his original habeas corpus petition before the South Carolina Supreme Court to an assertion that the state court refused to comply with the mandate of the court. Conspicuously absent from the brief is the petitioner's acknowledgement that his state court petition was limited to requesting the state court to apply two recent state court decisions, State v. Elmore, supra, and State v. Woods, supra, to his 1981 murder conviction because these decisions were issued after his trial and

appeal (Elmore) and after his state post conviction relief decision (Woods) in which no objections or exceptions were timely raised on the issue of the malice charge. Since the petition for habeas corpus had the limited allegation concerning the applicability of Elmore and Woods, the South Carolina Supreme Court's analysis is not as the petitioner would make it appear. The petition established the course for these extraordinary proceedings in the original jurisdiction of the court which is not a substitute for an appeal. Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). In its opinion, the state court stated "the question we must resolve is whether Elmore may be applied retroactively

to invalidate a conviction which was final at the time Elmore was decided." Yates v. Aiken, supra; J.A. at 31. This characterization was appropriate as a matter of state procedural law. While the proceeding has been ongoing, the petitioner has attempted to adjust his original claim by supplemental memorandum and briefs, but has not sought to amend his original petition. In Michigan v. Tyler, 436 U.S. 499 (1978), this Court held that the failure to present a federal question in conformance with state procedures constitutes adequate and independent grounds barring review in this Court so long as the state has a legitimate interest in enforcing its procedural rule. Accord Henry v.

State of Mississippi, 379 U.S. 443 (1965). The petitioner's belated attempt to raise the issue is not proper for this Court's review. The issue in the state court was limited to the retroactivity of a state decision as applied to state habeas cases. This Court has no power to revise judgments on state law.

In this matter, the constitutionality of the jury charges on malice was not raised at trial, on appeal, or in the state post conviction relief proceedings. After these successive defaults, the petitioner chose to attempt for the first time to challenge the instructions in a petition to the South Carolina Supreme Court requesting the court to apply its

decision in Woods and Elmore to his case because each had occurred subsequent to his appeal. Faced with this belated challenge in its extraordinary jurisdiction, the state court chose not to apply its own decisions retroactively. The insistence of the state court to reject retroactive application was based upon its consideration of "finality in the judicial process." J.A. at 34. The enforcement of this procedural bar serves such a legitimate state interest.

This Court has recently noted the distinction between direct review and collateral review. Pennsylvania v. Finley, __U.S.__, 107 S.Ct. 1990 (1987). In Finley, the court acknowledged that post conviction relief is not part of

the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. Of importance to this proceeding, this Court stated "states have no obligation to provide this avenue of relief, cf. United States v. MacCollum, 426 U.S. 317, 323 (1976) (plurality opinion) ...." In this case, the South Carolina Supreme Court held that in habeas corpus proceedings in its original jurisdiction, "collateral attack of a criminal conviction on the basis of legal precedent that developed after the conviction became final must be reserved for

those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction." J.A. at 34. The shaping of the jurisdictional limits of the state habeas proceedings by the state court in a proceeding that it is not constitutionally obligated to maintain under Finley is beyond the powers of this Court.

Respondents submit that the appropriate test for applying criminal law decisions retroactively to state post conviction or habeas corpus petitions is the analysis set forth by Justice Harlan in Mackey v. United States, 401 U.S. 667, 681-695 (1971) (concurring in part

and dissenting in part). Truesdale v. Aiken, 480 U.S.__, 107 S.Ct. 1394 (1987) (Powell, J., dissenting). Justice Harlan understood the purpose of collateral attack as being only to ensure proper application of the law prevailing at the time the conviction became final. Consequently, retroactive application of subsequent changes in constitutional interpretation was unnecessary and moreover unwise because it ignored the need for finality. Mackey, supra, 401 U.S. at 682-684. Desist v. United States, 394 U.S. 244 at 268 (1969) (Harlan, J., dissenting). Justice Harlan would permit retroactivity on collateral attack in only two situations: "new 'substantive due

process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the law-making authority to prescribe ...," Mackey, supra, 401 U.S. at 692, and nonobservance of those procedures that are "implicit in the concept of ordered liberty." Id. at 693.

The distinction between direct review and state collateral review is both reasonable and necessary in light of the legitimate interest such a practice will have on the finality of judgments. Unless retroactivity is unnecessary to correct an abusive practice in the guilt-determining process, collateral attacks of final

judgments should be discouraged. The reasons have been set forth by Judge Larner in State v. Blanchard, 98 N.J. Super. 22, 235 A.2d 913 (Law Div. 1967), in which he quoted Chief Justice Traynor:

> To begin with, their cases are history, and they should not now be given the power to rewrite it. To place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice. [98 N.J. Super. at 31, 235 A.2d at 918, quoting from Traynor, "Mapp v. Ohio at Large in the Fifty States," 1962 Duke L.J. 319, 340-341 (1962)].

A court has a general inherent power to decide whether a decision is to be retrospective or prospective. Great Northern R. Co.

v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932). The acceptance of this general principle is recognition of the fact that previous judge made law is not a nullity and in certain cases should be given effect despite the fact that the law has subsequently shifted direction. The original petition before the state court requested the state court to treat direct and collateral review similarly on this issue even though he had not previously sought to raise it. As addressed by Justice Harlan:

> Treating direct and collateral review as if they were of one piece seems to me to be faulty analysis, ignoring as it does, the jurisprudential considerations that differentiate the two kinds of adjudicatory

> functions. As a court of law we have no right on direct review to treat one case differently from another with respect to constitutional provisions applicable to both. As regards cases coming from collateral review, the problem of retroactivity is in truth none other than one of resettling the limits of the reach of the Great Writ ....

Mackey, supra, 401 U.S. at 701-702. The South Carolina Supreme Court wisely chose to limit the scope of retroactivity to those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct was not subject to criminal sanction. These legal principles enunciated by Justices Harlan and Powell conform with fundamental fairness demanded of our justice system in the finality of criminal

judgments. As Justice Cardozo said for the Court in Great Northern Railway, supra, 287 U.S. at 365, "The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. ... In making this choice, she is declaring common law for those within her borders." In this situation, the state court, while recognizing many factors affect the progress of a case through the lengthy appellate process, considered its approach to be more equitable to similar situated individuals than the approach now suggested by the petitioner. "The distinction ... properly rests on considerations of finality in the

judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere the closing must come." J.A. at 34. The applicability of the state decisions of State v. Elmore and State v. Woods were properly found to not be retroactive to the instant situation as a matter of state law. We submit that a similar analysis would reveal that Francis v. Franklin should not be applied retroactively to state collateral review to convictions already final when Franklin was announced because that decision did not divest the trial court of jurisdiction or remove criminal sanctions from the defendant.

In United States v. Johnson, 457 U.S. 537 (1982), this Court accepted Justice Harlan's view on retroactivity in the direct appeal area. As members of this Court have urged, this Court should take the next step and adopt in entirety Justice Harlan's bright-line distinction between direct appeals and collateral attacks. See Hankerson v. North Carolina, 432 U.S. 233, 246 (1977) (Powell, J., concurring); Shea v. Louisiana, 470 U.S. 51, 61 (1985) (Rehnquist, J., dissenting); Griffith v. Kentucky, 479 U.S.__, 107 S.Ct. 708, 717 (1987) (Rehnquist, C.J., dissenting).

Accepting Justice Harlan's approach to retroactivity of habeas corpus cases, we submit that this

Court's decision in Francis v. Franklin, supra, is not entitled to retroactive applications to collateral cases. Francis extended the holding of this Court in Sandstrom v. Montana, 442 U.S. 510 (1979), to cases where a jury was not required to presume conclusively an element of a crime under state law. Francis v. Franklin, supra, 105 S.Ct. at 1984 (Rehnquist, J., dissenting). In Francis, rather than examining the charge as a whole, the Court considered that a certain portion of the instruction on intent in isolation could reasonably have been understood to have created a mandatory presumption, even though it was informed that the "presumption may be rebutted" and

was surrounded by general instructions on the prosecution's burden of proof. In Sandstrom, supra, the Court held that the mandatory nature of the charge on intent "that the law presumes that a person intends the ordinary consequences of his voluntary acts" would have mandated a finding of intent regardless of whether other evidence in the case indicated the contrary. Sandstrom v. Montana, 442 U.S. 510 at 515.

Francis v. Franklin does not fall with Justice Harlan's exceptions to retroactivity because the new rule did not place "certain kinds of primary, private individual conduct beyond the law-making authority to prescribe," Mackey, supra, 401 U.S. at 692, or

claim a nonobservance of a procedure that was "implicit in the concept of ordered liberty," such as the right to counsel at trial. Further, Francis does not present the situation announcing "rules of criminal procedure required to ensure fundamental fairness" or "holding conduct entirely immune from criminal punishment." Solem v. Stumes, 465 U.S. 638, 654 n. 4 (1984) (Powell, J., concurring).

The petitioner contends that even if the Harlan approach to retroactivity was accepted, the South Carolina court plainly overlooked the first step in the retroactivity analysis of whether Francis v. Franklin and State v. Elmore actually created a "new" constitutional rule. While the

state court did not expressly address this issue, respondents submit that Francis v. Franklin did more than simply apply "a well-established constitutional principle to govern a case which is closely analogous to those that which have been previously considered in the prior case law." In his brief before this Court, the petitioner contends that Francis merely applied the settled legal precedents of Sandstrom v. Montana, supra, and Mullaney v. Wilbur, 421 U.S. 684 (1975), on mandatory rebuttable presumptions. This position is totally in conflict with his belated request to have Elmore apply to his 1981 conviction in his habeas petition before the South Carolina Supreme Court

wherein the issue was not raised at trial, on appeal, or in the initial state post conviction relief petition. Cf. Tucker v. Kemp, 256 Ga. 571, 351 S.E.2d 196 (1987). In his dissent, Justice Rehnquist saw Francis as extension of Sandstorm v. Montana, supra, not merely an application of Sandstrom. Francis, supra, 105 S.Ct. at 1980 (Rehnquist, J., dissenting). He further noted that the "reasonable juror" standard was a new legal standard drawing away from the established standard of review in Cupp v. Naughten, 414 U.S. 141 (1973). Id. at 1980, 1982-1983. The Petitioner's assertion is not correct.

B. Full retroactive application of Francis v. Franklin is not required because its major

> purpose was not to overcome an aspect of the criminal trial that substantially impairs its truth finding function.

Assuming arguendo that the analysis suggested by the petitioner is applicable to this state habeas review situation and that whether Francis v. Franklin should be given retroactive effect is properly before this Court, we respectfully submit that the standard of Linkletter v. Walker, 381 U.S.618 (1983), does not provide the relief he seeks under close analysis. While disfavored by some members of this Court, this test has been recently been utilized to deny retroactivity on collateral review to Batson v. Kentucky, 476 U.S.__, 106 S.Ct. 1712 (1986). Allen v. Hardy, 478 U.S.__, 106 S.Ct. 2878 (1986); see

also Solem v. Stumes, supra. In Linkletter, the Court announced a three-prong test by which it would decide whether a criminal decision based on the Constitution would be given retroactive application by looking at the purpose of the new rule; the reliance placed upon the old doctrine; and the effect on the administration of justice of a retroactive application of the rule. 381 U.S. at 636. While this Court's course of retroactivity decision has been "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim," Mackey, supra, 401 U.S. at 676, it is clear that retroactivity of its decisions is not compelled by the Constitution.

This Court, in holding Mullaney v. Wilbur, 421 U.S. 684 (1975), to be accorded full retroactive effect, stated "where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of jury verdicts in past trials," the new rule is to be given full retroactive effect. Hankerson v. North Carolina, 432 U.S. 233 at 243 (1977). The rule was first announced in Williams v. United States, 401 U.S. 646, 653 (1971). After stating the "major purpose rule," the Court went on to observe: "Neither good faith reliance by state or federal

authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application to these circumstances." The purpose served by a new constitutional rule is a major factor in applying this test. However, before application of the first prong, it must be closely examined.

There are three aspects to the Williams v. United States major purpose test: (1) the major purpose of the new rule must be to (2) correct a flaw that substantially impairs the truth-finding function of trial and (3) thereby raises serious questions about the reliability of past verdicts. All three aspects

of the Williams test must be satisfied before the need to apply the second two prongs of the Linkletter test is obviated. A new rule that merely collaterally enhances the integrity of the truth finding process will not be applied retroactively for that reason alone.

> [T]he fact that a new rule tends incidentally to improve or enhance reliability does not in itself mandate the rule's retroactive application .... Thus, retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process.

Gosa v. Mayden, 413 U.S. 665, 680 (1973). Also, some incorrect results that may have occurred due to the old rule is not enough to justify, by itself, retroactive application of the new rule. "Where we have been unable to conclude that use of such a 'condemned practice' in past criminal trials presents substantial likelihood that the results of those trials were factually incorrect, we have not accorded retroactive effect to the decision condemning that practice." Williams, supra, 401 U.S. at 655.

The question of whether a displaced rule has substantially impaired the truth-finding process requires the application of a balancing test. "The question of

the impact of particular decisions on the reliability and fairness of any aspect of a criminal proceeding is inherently a matter of balancing probabilities." Michigan v. Payne, 412 U.S. 47 (1973). The Court used this approach in Stovall v. Denno, 388 U.S. 293 (1967), which refused to apply United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), retroactively. The Court conceded that "a conviction which rests on a mistaken identification is a gross miscarriage of justice," and that the new rules were "aimed at avoiding unfairness at trial by enhancing the reliability of the fact-finding process in the area of identification evidence ...." 388 U.S. at 297. Nevertheless, the

Court held that the rule that counsel had to be present during lineups was not to be applied retroactively. In Solem v. Stumes, 465 U.S. 638 (1984), the Court refused to apply the rule of Edwards v. Arizona, 451 U.S. 477 (1981), that once a suspect has invoked his right to counsel, any subsequent conversation must be initiated by him retroactively to federal habeas review. The Court considered this rule to be a prophylactic rule designed to implement pre-existing rights. Solem, supra, 465 U.S. at 645. Compare Shea v. Louisiana, 470 U.S. 51 (1985) (Edwards applicable to cases pending on direct appeal in state court when Edwards was decided).

An analysis of Francis v. Franklin, supra, reveals that the test for retroactivity under the Linkletter test has not been met. Unlike In re Winship, 397 U.S. 358 (1970), which was the subject of Ivan V. v. City of New York, 407 U.S. 203 (1972), Francis v. Franklin, supra, did not announce a new constitutional doctrine. Rather, it announced a prophylactic rule designed to further effectuate the Winship doctrine as extended by Sandstrom v. Montana, 442 U.S. 510 (1979), to cases where the jury was not required to presume conclusively an element of a crime under state law. In this regard, Francis is similar to Michigan v. Payne, supra, and in that, like that case, Francis did not confer

"a constitutional right that had not existed prior to the decision" but rather "created a protective umbrella serving to enhance a constitutional guarantee." 412 U.S. at 54. The error asserted in Francis was not so much the instruction itself but the possibility that a "reasonable juror" could have misinterpreted the instruction. Francis v. Franklin, supra, 105 S.Ct. at 1971-1972. The major purpose of the rule in Francis is, therefore, to further effectuate the Winship doctrine by reducing the risk of possible jury misinterpretation of instruction that in the Court's opinion could lead to a Winship error. This prophylactic rule is not designed to overcome an aspect

of a trial that substantially impairs the truth-finding function. The mere possibility that a reasonable juror could misinterpret an instruction cannot be said to be a substantial impairment in the truth-finding process at trial. After all, "implicit in [the] constitutional requirements of jury trial is a belief that juries can be trusted ...." Jackson v. Denno, 378 U.S. 368 (1964). Our system of criminal justice could not operate if the effective presumption was that juries consistently misinterpret the instructions given to them by the court. Applying the rule of Francis retroactively would also "occasion windfall benefits for some defendants," Michigan v. Payne, supra, 412 U.S. at 53, and

would "undoubtedly affect cases in which no unfairness occurred." Stovall v. Denno, supra.

The purpose to be served by the prophylactic rule announced in Francis, therefore, would not be significantly furthered by full retrospective application. This is especially true in light of all the countervailing considerations of finality of judgments, reliance on the prior rule, the burden that retroactivity would have on the administration of justice, and the availability of other grounds for relief under Winship, supra, Mullaney v. Wilbur, supra, and Sandstrom v. Montana, supra, when the instruction goes beyond the mere possibility of jury interpretation and impinges upon

the proper distribution of the burden of proof. See Gosa v. Mayden, supra, 413 U.S. at 685 (finality considerations). There is no significant question of the accuracy of the process in the Yates case or in other Francis type cases--just the mere possibility of jury misinterpretation. There is no question but that Yates received a fundamentally fair trial and "essential justice" is not involved here.

Under the second prong, the reliance placed on the pre-Francis practice of relying on jury charges as a whole to determine the burden of proof rather than the "fine parsing of the jury instructions" to determine if a juror might understand a few sentences in the

charge to allow conviction on less than proof beyond a reasonable doubt. Francis, supra, 105 S.Ct. at 1980 (Rehnquist, J., dissenting). The case presently before this Court was tried in 1981, a full four (4) years before the decision in Francis. The new rule was not like Sandstrom v. Montana, supra, which derived from an "irrebuttable direction by the court to find intent," Sandstrom, supra, 442 U.S. at 517, nor forewarned from that decision. Rather, it was a new protective rule issued to prevent an unknowing encroachment upon the rights announced in Winship. Who could have foreseen that the possibility of jury misinterpretation of the words "presumption may be rebutted"

would be equated to lessening the state's burden of proof regardless of numerous charges advising the jury that the burden of proof rested solely on the state. The courts cannot be faulted for not anticipating Francis, see Cupp v. Naughten, 414 U.S. 141, 146-147 (1973) ("a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge"). "There was no clear foreshadowing of that rule." Adams v. Illinois, 405 U.S. 278 (1972).

The burden that retroactive application of the rule would place on the administration of justice also supports limiting retroactive application to cases at trial or on

appeal when it was decided. Clearly, the retroactive application of this new rule "would have an impact upon the administration of their criminal law so devastating as to need no elaboration .... At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine ... harmless error." Stovall v. Denno, supra, 388 U.S. at 300.

Respondents submit that Francis v. Franklin, supra, announced a rule that was not to correct a substantial inadequacy in the fact-finding process which had led to questionable verdicts. Further, the retroactive application of Francis would result

in reversals, or at least require significant court review, in many instances where there was no actual prejudice which is not justified by the countervailing considerations rooted in the Francis decision. Therefore, under the analysis under the Linkletter criteria, Francis v. Franklin, supra, should not be given full retroactive effect.

C. The jury charges on malice given in this case do not create mandatory rebuttable presumptions when reviewed under the "reasonable juror" analysis of Francis v. Franklin.

Respondents respectfully submit that the state courts have not reviewed the merits of entire jury charge in this case. The petitioner relies upon an introductory phrase in the third paragraph of the state court

opinion that "the jury instruction at Yates' trial suffered from the same infirmities present in Elmore and addressed in Francis v. Franklin, supra," Yates, supra, 349 S.E.2d at 85, to support his claim that the state court has already resolved the merits of the charge against the respondents. While the claims are similar to those present in Elmore, we submit that appropriate analysis under Francis v. Franklin, supra, reveals no constitutional infirmity in a case where no objection to the charge was raised at trial or in direct appeal and the burden of persuasion was never shifted to the defendant.

In South Carolina, state habeas corpus proceedings cannot be a substitute for an appeal. Tyler

v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). In this case, trial counsel Mauldin stated on the record after the jury instructions were given that the trial court had not intimated that the defendant had the burden of proof (by inference or statement). (Tr. p. 1217, 11. 10-19). No challenge has been made to counsel's competence or his failure to object to the charge in the state post conviction proceedings or on direct appeal and none is made here by the petitioner. Compare: State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981). We respectfully submit, therefore, that he has failed to meet his threshold burden of establishing a ground for relief under state procedural law. Simply

put, this forum is not a substitute for an appeal.

Assuming arguendo that the merits of his challenge to these proceedings can be reviewed, we respectfully submit that such a review reveals that he is not entitled to a new trial on murder. Yates challenges the instruction on malice concerning alleged "mandatory rebuttable presumptions." He contends that the part of the unobjected charge concerning the "doing of an unlawful act" and "use of a deadly weapon" created such a presumption. As stated in Francis v. Franklin, 105 S.Ct. 1965 at 1968 (1985), "[t]he question is whether these instructions, when read in the context of the jury charge as a

whole, violate the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt." The following analytical approach is used in cases raising this issue. First, the Court must determine whether based upon the specific language of the instruction creates a constitutionally objectionable "mandatory presumption," or "merely a permissive inference," on an essential element of the crime. Francis, 105 S.Ct. at 1971. Second, "if a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption ..., then the potential offending words must be considered

in the context of the charge as a whole." Francis, 105 S.Ct. at 1971.

Under the plurality's analysis in Francis, the initial step in ascertaining the constitutionality of an instruction is to determine the nature of the presumption it describes. Id. 105 S.Ct. at 1971. The Court must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference. To determine the nature of the "presumption," it is necessary to focus on the specific words spoken to the jury, for the constitutional standard depends on how a reasonable juror could have interpreted the instruction. If a specific portion of the jury

charge, considered in isolation, could have been understood as creating a presumption that relieves the State of its burden of persuasion, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm charge to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. Francis, supra, at 1971, citing Cupp v. Naughton, 414 U.S. 141 (1973).

The jury charge in this case contains two separate issues raised in this habeas proceeding to determine the nature of the presumptions. The first passage,

containing four sentences, reads:

> Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence.

(Tr. p. 1207, l. 20 - p. 1208, l. 8). J.A. at 6-7.

We submit this passage of the charge created a mere permissive

presumption. The first sentence made it clear that malice "may" be implied or "inferred" from the facts and circumstances proved by the state. The second sentence clarified and restated the first sentence, "it defined implied malice." Collins v. Francis, 728 F.2d 1322, 1330 (1984); Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S 1824 (1983). This sentence reflects "substantially the famous definition of malice by Bayley, J., in Bromage v. Proser, 10 E.C.L. 321: "'Malice, in common acceptation, means ill will against a person but in its legal sense it means a wrongful act done intentionally without just cause or excuse.'" State v. McDaniel, 68

S.C. 304, 312, 47 S.E. 384, 387 (1904). The petitioner would have a much stronger position if the second sentence read, "and malice must be implied, it must be presumed," or "malice shall be presumed, it shall be implied." Given the language used, "malice is implied, it's presumed ..., " and its context in the charge, the jury was left free to credit or reject the inference suggested by the court.

The third sentence made it clear that the jury was under no mandate to find that malice existed. The trial judge restated what he had said seconds before and qualified the statement with the words "in its general signification." There was not a

hint of a suggestion that the jury's fact finding duty was being curtailed or that it had to find that Yates had acted with malice. In the fourth sentence, the jury was not told that the defendant was required to rebut malice if it found it to exist. Instead, the charge only pointed out that it was <u>possible</u> to rebut the presumption. Immediately after the word "rebuttable," the judge drew the jury's attention back to its unique province to find malice from "the rest of the evidence" and then properly allocated the burden of proof on this issue to the state by stating that rebuttable meant "<u>it is not conclusive on you</u>." (Tr. p. 1208, l. 8). J.A. at 7.

Assuming arguendo, that this part of the instruction created a mandatory (rebuttable) presumption because of the terms "presume," "presumption," and "rebuttable," the Francis analysis leads to the single conclusion that a reasonable juror could not have understood the charge to have created an unconstitutional presumption. Francis, supra. Although the charge contains the word "presume," the jury was not told that malice "shall" or "must" be presumed if the State proves the predicate facts. In fact, it was specifically stated that "it is not conclusive on you." Unlike in Francis, the instruction in this case repeatedly announces its own permissiveness--the jury was free

to credit or reject the inference suggested by the Court. In addition, the words at issue were accompanied by a strong explanation of circumstantial evidence which would tend to indicate the ways the state could prove implied malice. Because of these factors, even if the words created some type of rebuttable presumption, its impact upon the reasonable juror was likely no greater than a reasonable inference.

The petitioner asserts this instruction relieved the State of establishing his <u>own</u> malicious intent in the murder of Mrs. Wood once it had been shown that he committed some unlawful act without just cause or excuse. The petitioner wholly ignores in his

belated attempt to challenge these instructions that the jury was specifically charged "a defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose." (Tr. p. 1210). J.A. at 8. Under these instructions, a reasonable juror could not have considered the allegedly infirm charges to have created an unconstitutional presumption. Francis, supra, at 1971.

It was clear that with charge on the law of the parties that the State's burden, under Sandstrom v.

Montana, 442 U.S. 510 (1979), and Francis v. Franklin, supra, would be to prove both that the actual killer, presumably Davis, had malice, and that Yates intended to be an accomplice in the crimes. Myrick v. Mashner, 799 F.2d 642 (10th Cir. 1986). Because of the forceful and repeated blows dealt by the perpetrator, the overwhelming evidence can allow the assumption that the actual killer had the specific intent to kill. Since the jury charge required the State to prove that Yates had agreed upon the "unlawful common purpose that involves the probable contingency of taking of a human life" (J.A. at 7-8), and there was overwhelming evidence of this agreement through the defendant's

own testimony, it must be concluded that any instruction on this matter, even if burden shifting was harmless. Myrick, supra. Cf. Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985).

In the second portion of the charge that is disputed reads as follows:

> ... malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

(Tr. p. 208). The petitioner asserts these instructions were infirm because a jury could have concluded that unless all the circumstances were reliably established, the jury was required to heed the presumption rather than the evidence, or lack of evidence, of malice. We respectfully submit that this charge created no presumption, not even a permissive one. The first sentence of the charge is derived from common law (see: State v. Levelle, 34 S.C. 120, 127, 13 S.E. 319, 320 (1891), and the statement is usually qualified by the instruction that the presumption "vanishes" or "is removed." See: State v. Hopkins, 15 S.C. 153, 157 (1880). The language is not mandatory, it is

simply a definition of malice. This instruction tells the jury that a finding of malice may be based entirely on circumstantial evidence, the use of a deadly weapon, but that the state must still prove malice by evidence which satisfies the jury beyond a reasonable doubt. There is no reference to the defendant or any duty on his part to produce "some" evidence. It can be concluded that a reasonable juror could only have understood that once the circumstances of the victim's death were in evidence, the state was not entitled to a presumption or inference of any kind. That was the factual situation presented in this case.

The United States Court of Appeals for the Fourth Circuit has recently upheld chalienges to a similar charge recently. Rook v. Rice, 783 F.2d 401 (4th Cir. 1986); Davis v. Allsbrooks, 778 F.2d 168, 173 (4th Cir. 1985). In each of these cases, the Fourth Circuit held that a state may legitimately shift a burden of production (not persuasion) on an element of a crime to the defendant. We submit that the effect of these charges does no more than that. These instructions, if anything, only shifted the burden of production on the defendant. Sandstrom v. Montana, 442 U.S. 510, 514-519 (1979). This Court should have no difficulty, as the Fourth Circuit did not, in concluding that the

"presumption" relied on satisfying the requirements of County Court v. Allen, 442 U.S. 140 (1979), that the fact allegedly presumed (malice) be rationally connected to the proven fact (use of a deadly weapon). Being satisfied of that nexus, we submit that this Court must reject his challenges to the jury instructions and find no constitutional infirmity that denied the petitioner a fundamentally fair trial. As previously stated, the charge read as a whole completely placed the burden of persuasion on the State to show murder beyond a reasonable doubt. The jury's conviction, based upon appropriate instruction, resolved that issue.

D. Assuming constitutional infirmity, the malice charge given was harmless error in light of the state's theory that Yates was an accomplice who promoted and assisted in the armed robbery and the existence of overwhelming evidence of his participation.

In Rose v. Clark, 478 U.S.__, 106 S.Ct. 3101 (1986), the United States Supreme Court held that the harmless error analysis of Chapman v. California, 386 U.S. 18 (1967), applies to jury instructions found to be impermissible under Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985). In Rose, this Court approved of a test under which the reviewing court should not set aside an otherwise valid conviction if the court may confidently say, on the whole record, that the constitutional error in question

was harmless beyond a reasonable doubt. In Rose, the Court held that "the fact that the respondent denied that he had an intent to do any injury to another does not dispose of the harmless error question." 106 S.Ct. 3101. It has been suggested that the inquiry is "whether the evidence was so dispositive of intent (malice) that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Rose, 106 S.Ct. at 3109, (quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1985) (Powell, J., dissenting). The South Carolina Supreme Court has not made such an inquiry based upon its disposition on other grounds.

As stated above, the inquiry is not whether intent was a disputed issue at trial. In its decision below, the Court held that Yates was found guilty of the murder of Mrs. Wood under the theory of the "hand of one, hand of all" that when two or more persons aid, abet, and encourage each other in the commission of a crime, all being present, each is guilty as a principal. Therefore, the State had to prove that the actual killer, Henry Davis, had malice, and that Yates intended to be an aider in the commission of the crime. Here, Yates and Davis spent two days casing places for an armed robbery, even discussing the possibility of the electric chair if someone was killed during the

robbery. (Tr. pp. 820-825). After selecting the store, Yates, armed with a gun, approached Willie Wood and demanded money, while Davis was making a stabbing motion with a knife toward Wood. (Tr. pp. 1084-1087). Wood gave Davis the money and was directed by him to bend over. (Tr. pp. 914-915). As Yates testified at trial, he shot at Wood after being directed to do so by Davis. (Tr. p. 1093, 1097-1098). After hearing a female voice, Yates said "let's go" and then went out the door and waited in the car for Davis. (Tr. p. 1098). Meanwhile, Davis approached Wood with the knife and his 68-year old mother attempted to help him. His mother was stabbed with a knife by Davis that forcefully penetrated

her heart and the full thickness of her chest. (Tr. pp. 917-918, pp. 954-955).

Here, it is clear that the jury found that the relevant predicate facts existed beyond a reasonable doubt and from those facts that malice could be inferred so that no rational juror could find that defendant Yates committed his acts without intending to assist Davis in the commission of the robbery. Yates raised no issue that Davis committed the murder with malice or that the murder by Davis was not done in furtherance of their purpose to rob the store. This evidence is overwhelming and permits this one rational conclusion. We submit that a reasonable juror could not have

found otherwise in the proof presented by the State, the instructions on the presumption of malice notwithstanding. Simply stated, it would defy common sense to conclude that this violent robbery-murder was committed unintentionally, and it follows that no rational jury would need to rely on the challenged portion of the charge on the issue of malice. See: McKenzie v. Risley, 801 F.2d 1519, 1526 (9th Cir. 1986); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986). Myrick v. Maschner, 799 F.2d 642 (10th Cir. 1986) (while petitioner asserted that he did not intend to assist the triggerman, harmless error was found where his intent to aid in the commission of the substance crimes went beyond

mere presence at the scene); Sturgis v. Goldsmith, 796 F.2d 1103 (9th Cir. 1986); Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986). Burton v. Foltz, 810 F.2d 118 (6th Cir. 1987); Baker v. Montgomery, 811 F.2d. 557 (11th Cir. 1987) (Sandstrom error may be harmless even when a defendant contests intent by asserting self-defense).

CONCLUSION

For the foregoing reasons, the respondents request that the judgment of the Supreme Court of South Carolina be affirmed.

Respectfully submitted,

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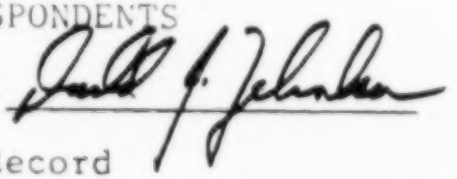
By: 

* Counsel of Record

July 15, 1987
Columbia, South Carolina

No. 86-6060

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DALE ROBERT YATES,

Petitioner,

vs

JAMES AIKEN, WARDEN, AND
THE ATTORNEY GENERAL OF
SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief for Respondents in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 15th day of July, 1987.

Donald J. Zelenka

SWORN to before me this
15th day of July, 1987.

(LS)
Notary Public for South Carolina
My Commission Expires: 2-12-97 .

No. 86-6060

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief for Respondents on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to David I. Bruck, Esquire, P. O. Box 11311, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 15th day of July, 1987.

Donald J. Zelenka

SWORN to before me this
15th day of July, 1987.

_____ (LS)
Notary Public for South Carolina
My Commission Expires: _____.

REPLY

BRIEF

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ARGUMENT IN REPLY

A. There Are No State Law Procedural Obstacles to Consideration of Petitioner's Federal Claims.

Respondents first present a series of procedural reasons why the Court should not reach the retroactivity question which it granted certiorari to decide. It is a sufficient answer to all of these procedural arguments that the decision below rests entirely on the South Carolina Supreme Court's view concerning the retroactivity of the principles of *Francis* v. *Franklin*, 471 U.S. 307 (1985). In its opinion, the state court conceded that the instructions at issue in this case were invalid under *Francis*. *Yates* v. *Aiken*, 290 S.C. 232, 234, 349 S.E.2d 84, 85 (1986); J.A. at 31. The court then proceeded to address and decide the question of retroactivity of decisions condemning mandatory rebuttable presumptions in criminal cases, and to dispose of petitioner's case on that basis alone, without the slightest intimation that petitioner's federal constitutional claim was otherwise barred. *Id.*, J.A. at 31-34. When a state court has decided a federal question on its merits, this Court has jurisdiction to determine whether that federal question was correctly decided. *See County Court of Ulster County* v. *Allen*, 442 U.S. 140, 147-154 (1979). "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). Given that the South Carolina Supreme Court acknowledged the federal constitutional infirmity of the instruction at issue, and denied relief solely on its conclusion that petitioner was not entitled to retroactive application of the legal principles involved, it cannot be seriously contended that the state court "actually . . .

relied" on any state law procedural ground. *Caldwell* v. *Mississippi*, *supra*.

Moreover, no such procedural bar exists under South Carolina law. As petitioner has previously pointed out, Brief of Petitioner at 6, n. 5, South Carolina does not recognize procedural default in capital cases, and the state supreme court's opinion affirming petitioner's convictions and death sentence on direct appeal reflects that the court conducted an independent search of the record to uncover any prejudicial error which petitioner might have neglected to raise. *State* v. *Yates*, 280 S.C. 23, 45, 310 S.E.2d 805, 814 (1982), *cert. denied*, 462 U.S. 1124 (1983); J.A. 26. Under these circumstances, petitioner's failure to raise his *Sandstrom* claim at trial or on direct appeal creates no procedural bar of any sort, and is irrelevant to the issue now before the Court.

Respondents also claim that petitioner's failure to raise his *Sandstrom/Francis* claim in his application for post-conviction relief in the state trial court operated as some sort of waiver. This assertion is not only unaccompanied by any state law authority, but is wholly unsupported by the opinion of the South Carolina Supreme Court in this case. J.A. 30-36. It is also contrary to the position taken by respondents at the time the petition for habeas corpus was filed. In their return to the petition, filed on February 14, 1985, respondents advanced no procedural objection to consideration of the petition on its merits, and argued only that the challenged jury instruction did not require reversal of petitioner's conviction. Return to Petition for Habeas Corpus, *Yates* v. *Aiken*, *supra*. Moreover, respondents expressly consented to a motion by petitioner to consolidate his habeas petition with a discretionary appeal from the denial of his state post-conviction

relief application. At that time, respondents' position was as follows:

> To assure continuity of these proceedings and prevent unnecessary multiple litigation, Respondents have no objection to the consolidation motion to resolve the apparent issues.

Id., at 2. It was not until this Court granted certiorari and remanded petitioner's case for reconsideration in light of *Francis* v. *Franklin*, *Yates* v. *Aiken*, 474 U.S. 896 (1985), that respondents first sought to persuade the South Carolina Supreme Court that a habeas corpus petition was an inappropriate vehicle for challenging the malice instructions at issue. On remand, the South Carolina Supreme Court did not so much as acknowledge, let alone accept, the procedural argument which respondents now reassert here, but disposed of petitioner's claim solely on grounds of nonretroactivity. Under these circumstances, respondents' continued insistence that the decision below actually rests on some sort of state law procedural bar is groundless.

Respondents further suggest that review of the merits of petitioner's *Francis* claim is barred by a purported defect in his state habeas corpus petition. Brief of Respondents at 25-26. According to respondents, the habeas corpus petition sought no more than retroactive application of two state supreme court decisions, *State* v. *Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), and *State* v. *Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), and should therefore be governed by state retroactivity principles. In making this argument, respondents have neglected to mention that the habeas petition characterized the charge at issue as an "unconstitutional burden-shifting instruction," citing *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). Petition for Habeas Corpus at 3, *Yates* v. *Aiken*, 290 S.C.

232, 349 S.E.2d 84 (1986). The federal constitutional character of petitioner's claim was evidently apparent to respondents at the time the petition was filed, since they responded by furnishing the state supreme court with a brief previously filed in a federal habeas corpus case which discussed in detail the constitutionality of an identical jury instruction. Return to Petition for Writ of Habeas Corpus at 2, *Yates* v. *Aiken;* Respondent's Objections to the Report and Recommendations of the Magistrate, *Hyman* v. *Aiken*, 606 F. Supp. 1046 (D.S.C.), *aff'd in part and rev'd in part*, 777 F.2d 938 (4th Cir. 1985), *vacated and remanded*, 478 U.S. ___, 106 S.Ct. 3327 (1986), *rev'd*, 824 F.2d 1405 (4th Cir. 1987). It is therefore both inaccurate and misleading to suggest that the habeas petition was in any way limited to questions of state law. Petitioner stressed the question of retroactivity of *Elmore* and *Woods* only to make clear to the South Carolina Supreme Court that its prior determination that petitioner's trial had been free from federal constitutional error was now inconsistent with intervening decisions of the state court itself. In view of the unmistakable terms in which the state supreme court addressed the question of retroactivity in this case, the total absence of any type of state procedural bar to petitioner's underlying constitutional claim, and the fact that he undeniably presented that claim to the South Carolina Supreme Court in his habeas petition, respondents' belated efforts to raise procedural barriers to review of the retroactivity issue in this case are disingenuous and entirely without merit.

B. Respondents Views on the Retroactivity of *Francis* v. *Franklin* Cannot be Squared With the Court's Opinion in *Francis* Itself.

Little need be said by way of reply to respondents' defense of the South Carolina Supreme Court's refusal to

accord full retroactive application to *Francis* v. *Franklin*. Despite the *Francis* Court's unequivocal declaration that it was doing no more than applying the principles of *Sandstrom*, 471 U.S. at 313, respondents now insist that *Francis* actually created some sort of new "prophylactic rule . . . [against] the mere possibility that a reasonable juror could misinterpret an instruction" on presumptions. Brief of Respondents at 54-55. Respondents also suggest, on the basis of one of the dissenting opinions in *Francis*, that *Francis* represented a considered decision by this Court to abandon "the pre-*Francis* practice of relying on jury charges as a whole to determine the burden of proof rather than the 'fine parsing of jury instructions' to determine if a juror might understand a few sentences in the charge to allow conviction on less than proof beyond a reasonable doubt." Brief of Respondents at 57-58.

Both of these arguments are meritless. *Francis* did not create any sort of "prophylactic rule," but simply applied the settled principles of *Sandstrom* to jury instructions which created mandatory rebuttable presumptions of intent. While a minority of the Court did take the view that the *Francis* majority was extending *Sandstrom*, 471 U.S. at 332 (Rehnquist, J., dissenting), the Court explicitly rejected this assertion as "simply inaccurate," and noted that *Sandstrom's* condemnation of mandatory rebuttable presumptions such as those involved in *Francis* had actually been "definitively established" as early as *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). 471 U.S. at 317, n. 5. Nor is there any merit in respondents' contention that *Francis* represented a departure from the well-established rule, restated and applied in *Francis* itself, that "potentially offending words must be considered in the context of the charge as a whole." 471 U.S. at 315. While respondents evidently disagree with *Francis*, that

disagreement does not support their claim that *Francis* established new legal doctrine or some sort of novel and unforeseeable mode of appellate review. The inescapable fact is that *Francis* v. *Franklin* "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law," *Desist* v. *United States*, 394 U.S. 244, 263 (1969) (Harlan, J. dissenting), and thus presents "no real question . . . as to whether the new decision should apply retrospectively." *United States* v. *Johnson*, 457 U.S. 537, 549 (1982).

C. The South Carolina Supreme Court Correctly Determined That the Challenged Instructions Violated *Sandstrom* and *Francis*.

Next, respondents urge this Court to overrule the determination of the South Carolina Supreme Court that the jury instructions at issue here created unconstitutional mandatory presumptions of malice. *Yates* v. *Aiken*, 290 S.C. 232, 349 S.E.2d 84 (1986); *State* v. *Peterson*, 287 S.C. 244, 335 S.E.2d 800, 802 (1985); *accord Hyman* v. *Aiken*, 824 F.2d 1405 (4th Cir. 1987). Should the Court accept this invitation to probe the underlying merits of petitioner's constitutional claim, petitioner submits that it will find respondents' defense of the challenged instructions to be without merit.

After defining "expressed" malice for petitioner's jury, the trial judge gave the following instruction on implied malice:

> Malice may also be implied as where, although no expressed intention to kill was proven by direct evidence, it is directly and necessarily inferred from facts and circumstances which are, themselves, proved. *Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse.* In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but is rebuttable by the rest of the evidence. *I tell you, also, that malice is implied or presumed from the use of a deadly weapon.* I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

J.A. 607 (emphasis added).

Respondents assert that the first of these challenged instructions created no more than a permissive inference of malice. It is true that the trial judge prefaced the instruction on the presumption of malice from the intentional doing of an unlawful act by language which suggested that he was about to convey only a permissive inference ("Malice may also be implied . . ."). However, immediately after this sentence the trial judge announced a presumption which was by its terms a mandatory one: "Malice *is implied or presumed by the law* from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." J.A. 6-7 (emphasis added). This mandatory instruction nullified the permissive character of the preceding sentence, since the jury could only have reconciled the two instructions by reasoning that while some basic facts "may" give rise to the implication of malice, facts which show the intentional

doing of an unlawful act are the type of facts which invariably do give rise to such an implication or presumption.

Respondents insist that this second sentence merely "'defined implied malice.'" Brief of Respondents at 69, quoting *Collins* v. *Francis*, 728 F.2d 1322, 1330 (11th Cir.), *cert. denied*, 469 U.S. 963 (1984). This assertion is belied, however, by the trial judge's ensuing statement that the presumption of malice "is rebuttable, that is, it is not conclusive on you . . ." J.A. 7. A *presumption* may be rebutted; a *definition* may not. The definition of malice, moreover, had already been given somewhat earlier in the charge, when the judge stated that "[m]alice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action." J.A. 6.[1]

The second presumption—that "malice is implied or presumed from the use of a deadly weapon"—is cast in slightly different terms, but is equally mandatory, and is surrounded by no permissive language at all. J.A. 7. Nor was the effect of this instruction altered, as respondents

[1] Indeed, respondents in effect concede that the challenged language constitutes a presumption rather than a definition of malice by their admission that petitioner "would have a much stronger position if the [judge had charged that] 'malice *must* be implied, it *must* be presumed,' or 'malice *shall* be presumed, it *shall* be implied." Brief of Respondents at 70. Although respondents claim to discern an important distinction between an instruction that malice "shall be presumed" and one that malice "is presumed," a reasonable juror would have interpreted either statement as creating a mandatory presumption of malice. In arguing to the contrary, respondents have evidently overlooked the fact that the unconstitutional instructions in *Francis* v. *Franklin* itself used the phrases "are presumed" and "is presumed," 471 U.S. at 311, and were in this respect materially identical to the instructions at issue here.

insist, Brief of Respondents at 77-78, by the judge's ensuing statement that the presumption is removed if "the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to." J.A. 7. This instruction is ambiguous at best, and was most probably understood as confirming rather than alleviating the burden-shifting character of the presumption. This is so because the jury could reasonably have concluded from the instruction that unless all of the circumstances were reliably established through petitioner's testimony or other proof, the jury was required to heed the presumption rather than the evidence. It is undoubtedly for this reason that the South Carolina Supreme Court has repeatedly found this instruction to create a burden-shifting mandatory presumption of malice despite the presence of language which respondents view as ameliorative. *Yates* v. *Aiken*, 290 S.C. 232, 233, 349 S.E.2d 84, 85 (1986); *State* v. *Peterson*, 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985); *State* v. *Woods*, 282 S.C. 18, 20, 316 S.E.2d 673, 674 (1984); *State* v. *Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983); *see also State* v. *Patrick*, 289 S.C. 301, 303-305, 345 S.E.2d 481, 482-483 (1986).

That the South Carolina Supreme Court was correct in recognizing the unconstitutionality of the instructions given at petitioner's trial may be clearly seen by comparing them with the instructions at issue in *Francis* v. *Franklin* itself. The petitioner in *Francis* was tried for murder, defined under state law as causing the death of another "unlawfully and with malice aforethought, either express or implied." On the issue of intent, the trial judge instructed the jury that

> [t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound

> mind and discretion is presumed to intend the natural and probably consequences of his acts, but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Francis v. *Franklin*, *supra*, 471 U.S. at 311-312.

This Court affirmed the granting of federal habeas corpus relief in *Francis* upon the ground that these instructions "direct[ed] the jury to presume an essential element of the offense—intent to kill—upon proof of other elements of the offense—the act of slaying another." The Court concluded that the instructions were unconstitutional because they "'undermined the factfinder's responsibility at trial, based upon evidence adduced by the State, to *find* the ultimate facts beyond a reasonable doubt.'" *Id.*, at 316, quoting *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 156 (emphasis added by *Francis* Court).

The Court acknowledged in *Francis* that, unlike the challenged instruction in *Sandstrom* v. *Montana*, *supra*, the presumption of intent given at Franklin's trial was not conclusive. However, the Court noted that under the principles of *Sandstrom*, this distinction provided no basis upon which to uphold Franklin's conviction. 471 U.S. at 316-317. The Court then went on to examine certain other portions of the instructions given at Franklin's trial to determine whether the charge considered as a whole might pass constitutional muster. Immediately after the two instructions concerning the presumption of intent, the trial judge had instructed the jury that "[a] person will not be presumed to act with criminal intention . . ." In

addition, he had repeatedly stressed that the burden of proof was on the state. Nevertheless, the Court found that the jury might reasonably have interpreted the charge as a whole to mean that "although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise." 471 U.S. at 319-320. As for the instruction that a person was not to be presumed to act with *criminal* intent, the Court observed that the jury might have understood this to refer to a different element of the offense than that referred to in the preceding instructions on the presumption of intent. Alternatively, the jury might simply have understood this instruction to contradict the mandatory presumption which immediately preceded it. Since "[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other," the Court recognized that "the jury was left in a quandary as to whether to follow that instruction or the immediately preceding one it contradicted." 471 U.S. at 322, 324.

The constitutional defects identified in *Francis* are equally present here. Petitioner's jury was instructed that an essential element of the offense of murder—malice—was implied or presumed "by the law" from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse, and was also "implied or presumed" from the use of a deadly weapon. These presumptions, like the presumptions in *Francis*, were described as "rebuttable." As the *Francis* majority opinion pointed out, however, the Court had already made clear in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) that a mandatory rebuttable presumption was no less uncon-

stitutional than the arguably conclusive presumption struck down in *Sandstrom*.

Nor does any other portion of the instructions suffice to ensure, with the certainty that *Francis* requires, that the jury's deliberations were not affected by the mandatory presumptions contained in these instructions. Indeed, nowhere in the instructions given at petitioner's trial can any cautionary instruction be found comparable to the instruction in *Francis* that "a person will not be presumed to act with criminal intention." With respect to *one* of the two mandatory presumptions given here—the presumption of malice from the use of a deadly weapon—the trial judge did say that "when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed." But this instruction, much like the instruction on the "rebuttable" nature of the presumption, may well have exacerbated the constitutional defect by suggesting that the presumption of malice remained in effect unless and until it was overcome by the defendant. *Francis* v. *Franklin*, *supra*, 471 U.S. at 321-322, n. 7.

That *Francis* compels the result urged by petitioner in this case becomes all the more apparent when it is observed that in *Francis* the trial judge cautioned the jury, immediately before the portion of the charge containing the unconstitutional presumptions, that the burden of proof was on the state and that "there is no burden on the defendant to prove anything." *Francis* v. *Franklin*, *supra*, 471 U.S. at 329 (Powell, J. dissenting), 471 U.S. at 335 (Rehnquist, J., dissenting). A majority of the Court implicitly rejected the state's argument in *Francis* that even this relatively emphatic language was sufficient to ensure that the jury would not be misled by the burden-shifting presumptions which immediately followed. In the

case at bar, by contrast, no such instruction was given: the closest approximation contained in the burden-of-proof instructions given here was a simple statement that "[t]he defendant does not have to prove that he's innocent" and that the prosecution "must convince you, beyond a reasonable doubt, by evidence presented in this courtroom, of the guilt of the Defendant." J.A. 5. If the far more emphatic cautionary instruction given in *Francis* was insufficient to overcome the prejudicial impact of the unconstitutional presumptions in that case, it follows *a fortiori* that here, where no similar admonition concerning the burden of proof was given, due process requires that the conviction be reversed.

Respondents also assert that the challenged presumptions merely shifted the burden of production to petitioner, while leaving the burden of persuasion upon the prosecution. Respondents provide no analysis in support of this claim, but reply upon dicta in two Fourth Circuit cases, *Davis* v. *Allsbrooks*, 778 F.2d 168 (1985), and *Rook* v. *Rice*, 783 F.2d 401 (1986), *cert. denied*, 478 U.S. ___, 107 S.Ct. 3315 (1987). Both of these cases are actually harmless error determinations rather than determinations of the constitutionality of the challenged instructions, and both cases are in any event inapposite. *Davis* and *Rook* involved instructions which created rebuttable presumptions of malice upon proof beyond a reasonable doubt that a killing had been committed *intentionally* and *by the accused*. Unlike the instructions at issue here, which have been repeatedly construed by the South Carolina Supreme Court as creating unconstitutional mandatory presumptions of malice, *see*, *State* v. *Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983); *State* v. *Peterson*, 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985); *Yates* v. *Aiken*, 290 S.C. 232, 233, 349 S.E.2d 84, 85 (1986), those

involved in *Davis* and *Rook* had been construed by the North Carolina Supreme Court as shifting only the burden of production. The Fourth Circuit accepted this characterization because the presumption did not become operative until the state had proven both that the defendant had personally killed the victim, and that he had done so intentionally. The *Davis* and *Rook* courts then found that the instruction did not violate either defendants' rights under *Francis* because the evidence actually presented at trial in each case removed the element of malice from contention once the state had proved an intentional killing. Thus *Davis* and *Rook* are harmless error determinations based on the specific facts of those cases, and neither the instructions involved nor the Fourth Circuit's analysis provide any support for respondents position here.

That *Davis* and *Rook* do not support respondents' view on the constitutionality of the instructions given at petitioner's trial has now been made abundantly clear by the recent decision of the Fourth Circuit in *Hyman* v. *Aiken*, 824 F.2d 1405 (1987). In *Hyman*, the Fourth Circuit found the pre-*Elmore* South Carolina malice instructions to violate *Sandstrom* and *Francis*. The instructions given in this case are materially identical to those at issue in *Hyman*, and are unconstitutional for the same reasons set forth by the Fourth Circuit in that case.

D. Respondents Harmless Error Argument Provides No Basis Upon Which to Affirm the Judgment Below.

Respondents' final claim is that the constitutional violations which occurred at petitioner's trial should be disregarded as harmless. Brief of Respondents at 81-87. In advancing this argument, respondents acknowledge that this argument rests upon what they believe to be the

effect of South Carolina's law of accomplice liability on the facts of petitioner's case. *Id.*, at 83. They further concede that the South Carolina Supreme Court has as yet expressed no view on the merits of respondents' harmless error claim. *Id.*, at 82. Nevertheless, respondents urge this Court to make the initial determination of the harmlessness *vel non* of the erroneous jury instructions given at petitioner's trial.

Clearly, such a course would contravene this Court's well-settled practice of leaving harmless error determinations to the lower courts. *Rose* v. *Clark*, 478 U.S. ___, 106 S.Ct. 3101, 3109 (1986) (remanding to court of appeals for determination of harmlessness of *Francis* error); *Connecticut* v. *Johnson*, 460 U.S. 73, 102 (Powell, J., dissenting) (harmless error "is a question more appropriately left to the courts below"); *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) (Supreme Court's authority to decide harmless error claims is used only sparingly). However, should the Court elect to search the record and construe South Carolina law in order to determine whether the constitutional violations at issue here may be disregarded as harmless, it will find respondents' argument to be without merit.

The thrust of respondents' harmless error argument is that petitioner was tried and convicted of murder under South Carolina's law of parties, which holds each participant in an dangerous felony liable as a principal for all of the foreseeable consequences of that felony. *State* v. *Woods*, 189 S.C. 281, 1 S.E.2d 190 (1939). According to this view, the state was required to do no more than prove petitioner's intent to participate in the robbery of the victim's store in order to convict him as her murderer, so long as the malicious intent of the actual killer, Davis, was also established.

This argument overlooks the issues created both by petitioner's defense and by the prosecution's theory of the case. It was petitioner's contention that he had abandoned the robbery prior to Mrs. Wood's arrival on the scene, that he had communicated this abandonment to his accomplice, that he never saw Mrs. Wood at the scene, and that he was not legally responsible for her death. Tr. 1092-1099. Petitioner further testified that prior to entering the victim's store, he and Davis had planned to abandon the robbery and flee the scene without harming anyone if the proprietor refused to give them the money. Tr. 1084-1085. Petitioner did admit to superficially wounding Willie Wood after Mr. Wood appeared to reach for a gun under the counter. Tr. 1097-1098. But petitioner then ran from the store while urging Davis to do the same. The evidence was thus sufficient to enable the jury to conclude that Davis' action in killing Mrs. Wood was sufficiently far removed from the original conspiracy to commit robbery, and that petitioner had sufficiently abandoned that conspiracy prior to Mrs. Wood's arrival on the scene, so as to free petitioner from liability under the law of parties. *State* v. *Peterson*, 287 S.C. 244, 247, 335 S.E.2d 800, 801-802 (1985) (South Carolina law of accomplice liability inapplicable unless jury finds that a homicide was the probable result of acts *actually agreed upon* by co-conspirators).

Faced with the possibility that the jury would accept petitioner's testimony and reject the state's case for murder under a theory of vicarious liability, the prosecutor asserted as an alternative theory at trial that petitioner and Davis had actually intended from the outset to kill any witnesses to the robbery, including Mrs. Wood. Tr. 1172-1176. This argument, which was based on rather tenuous strands of circumstantial evidence, sought to

convict petitioner by establishing his own malicious intent in the actual killing of Mrs. Wood.[2] While it is unlikely that the jury would have accepted this assertion on the strength of the evidence presented, the prosecution's burden was substantially lightened by the trial judge's instructions on the presumptions of malice arising from the doing of an unlawful act and from the use of a deadly weapon. The reason for this is that the presumptions could reasonably have been interpreted as directing the jury to find that Yates entertained actual malice in the murder of Mrs. Wood, under the state's intent-to-kill theory, solely on the basis of evidence that he employed a deadly weapon and that he had intentionally committed an unlawful act—robbery—prior to the killing. Since the evidence was obviously not "so dispositive of [petitioner's] intent that the jury would have found it unnecessary to reply on the presumption," *Connecticut* v. *Johnson*, 460 U.S. 73, 97 n. 5 (1983) (Powell, J., dissenting), respondents' harmless error argument is without merit. *Rose* v. *Clark*, 478 U.S. ___, 106 S.Ct. 3101, 3109 (1986).

Moreover, even if a reviewing court were to accept respondents' unwarranted assumption that the jury ignored the prosecutor's intent-to-kill theory and convicted petitioner solely under a theory of accomplice liability, the unconstitutional malice instructions still could not be disregarded as harmless. This is so because the instructions effectively directed the jury to disregard

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[2] The prosecutor stressed that the robbers did not conceal their identities, and asserted that Davis' use of a knife in the robbery, and his order to Willie Wood to bend over the counter, showed both robbers' pre-existing plan to commit murder without creating any noise or attracting attention. The prosecutor also argued that petitioner and Davis probably saw Mrs. Wood outside the store just before the robbery. Tr. 1172.

petitioner's claim of withdrawal in deciding whether to convict him of Mrs. Wood's murder. In the accomplice-liability context, the two presumptions of malice allowed the jury to avoid the crucial question of whether petitioner's felonious intent was sufficient, under all of the facts and circumstances revealed by the evidence, to hold him vicariously liable for a murder committed by Davis. Instead of being required to determine whether the murder of Mrs. Wood was the probable consequence of the actions actually agreed upon by petitioner, *State* v. *Peterson*, 287 S.C. 244, 247, 335 S.E.2d 800, 801-802 (1985), the jury was instructed to presume petitioner's malicious mental state simply from his use of a deadly weapon, and from his participation in an unlawful undertaking, and to convict of him of murder on that basis.

Respondents insist that the prejudicial effect of the challenged presumptions was alleviated by the trial judge's instruction that "a defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not connected with the original unlawful purpose." J.A. 8, Brief of Respondents at 74. In fact, this instruction was irrelevant to the issue before the jury. The killing of Mrs. Wood was unquestionably "connected" in some sense with the original unlawful purpose. But the crucial issue at trial was not whether Mrs. Wood's death bore any connection to the robbery of her store, but whether petitioner's own criminal intent was sufficient to warrant holding him liable for her murder under South Carolina's law of accomplice liability.

Finally, petitioner would note that the cases cited by respondents in support of their harmless error argument are inapposite. *Sturgis* v. *Goldsmith*, 796 F.2d 1103

(1986), *McKenzie* v. *Risley*, 801 F.2d 1519 (9th Cir. 1986), *Bates* v. *Blackburn*, 805 F.2d 569 (5th Cir. 1986), *Burton* v. *Foltz*, 810 F.2d 118 (6th Cir. 1987), and *Baker* v. *Montgomery*, 811 F.2d 557 (11th Cir. 1987), are all cases in which the defendant personally killed the deceased, and in each case the proof of the improperly-presumed element—intent—was overwhelming. In *Beck* v. *Norris*, 801 F.2d 242 (6th Cir. 1986), the sole issue at trial was whether several eyewitnesses to a robbery-murder had correctly identified the defendant as the killer, and this rendered harmless any erroneous instructions on the killer's intent. 801 F.2d at 245. In *Myrick* v. *Maschner*, 799 F.2d 642 (10th Cir. 1986), the defendant was convicted as an accomplice on the basis of evidence that he was present, aiding and abetting in the murder of a police officer. The defendant denied committing the acts alleged. However, the evidence left no possible doubt of his intent to aid and abet the murder once the acts alleged to constitute aiding and abetting were themselves established, and under these circumstances the trial judge's use of an unconstitutional presumption of intent was harmless. In this case, by contrast, petitioner was not present for the murder, urged the killer to withdraw before the victim's arrival on the scene, and did nothing to assist the killer after the victim arrived. Under the unusual circumstances presented here, the presence or absence of malice was very much at issue even once the predicate facts—petitioner's participation in the initial robbery, and his use of a deadly weapon—were established. Thus the *Francis* violations which occurred at petitioner's trial cannot be disregarded as harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, and for those set forth in petitioner's opening brief, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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